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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 714

MACCLENNY TURPENTINE COMPANY, A FLORIDA CORPORATION, ET AL.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, A PUBLIC CORPORATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

THOS. B. ADAMS,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable, the Supreme Court of the United States:

Macclenny Turpentine Company, a Florida corporation, Ferndale Groves Company, a Florida corporation, Baldwin Realty Investments, Inc., a Florida corporation, B. J. Padgett, Eleanor B. Pratt and Clement A. Pratt, her husband, Elizabeth C. Pace, individually and as Executrix of the Estate of Charles F. Pace, deceased, Nellie C. Bostwick, Mrs. A. K. Fouraker, Emma F. Stokes and F. M. Stokes, her husband, Respondents, before the Supreme Court of Florida and Plaintiffs in the court below, respectfully petitioning, show unto the court:

Summary Statement of Matters Involved

The Petitioners, as property owners and as lienors, severally, by their Amended Bill (R. 7 to 85) sought can-

cellation and injunction with respect to past and future Drainage District taxes levied for debt service purposes and maintenance purposes. (See 15th and 16th prayers of the Bill, R. 78.)

The Respondents, Baldwin Drainage District, its supervisors and bondholders, attacked the bill by a general motion to dismiss (R. 95) and by motions to strike (R. 91) sundry parts of the bill.

The Chancellor by his order of April 3, 1943 (R. 98) denied the general motion to dismiss but granted the motion to strike in part and denied the motion to strike in part.

Thereupon, the Respondents petitioned the Supreme Court of Florida for a writ of certiorari (R. 100) to review the Chancellor's order. The Petitioners here presented a cross-petition (R. 107) to review that part of the order adverse to them.

The majority opinion of the Supreme Court of Florida (R. 113 to 120) 18 So. (2d) text 793, held, first, that State tax deed title owners were in no better position to make attack than were owners who had derived title from parties who were owners when the District was formed. In what was called the "second phase of this attack" the majority opinion, 18 So. (2d) text 794, listed thirteen points as constituting what was involved. This listing did not recognize that any Federal question was presented by the bill. Following such listing of points the majority opinion, 18 So. (2d) 795, first column, said:

> "Reduced to a simple statement, the bill constituted an assault in 1943 against the drainage district incorporated under general law in 1916 * * * the vital point in the controversy is whether the whole bill should not have been dismissed upon motion on the ground of estoppel by acquiescence."

The majority opinion supporting the sixth headnote, 18 So. (2d) text 796, states the gist of the decision which

s that on account of conduct and acquiescence *presumed have existed* on the part of former owners, all of the ıintiffs, Petitioners here, were precluded from being ırd on any of the thirteen points previously listed. The jority opinion concluded, 18 So. (2d) text 796, with this ıguage:

> "For the reasons which we have pointed out we conclude that the motion to dismiss should have been granted because of the extensive period of time which elapsed between the formation of the district and the filing of the bill in this case, which clearly establishes, in our opinion, acquiescence on the part of those who could have protested."

ereupon, the court ordered the Chancellor to dismiss the l. The judgment of the Supreme Court of Florida in that ıalf appears R. 132. That judgment is final for purposes this petition.

The dissenting opinion delivered by Mr. Justice Chapman . 121 to 132), 18 So. (2d) 796 to 802, analyzed the bill an entirely different basis from that found in the jority opinion and recognized the presence of Federal estions presented thereby. For instance, at R. 129 and 18 So. (2d) text 801, bottom first column, Mr. Justice apman said:

> "In the amended bill of complaint, by appropriate allegations, it has been made to appear that described property of the named plaintiffs is being taken without due process of law and the equal protection of the law and they are being deprived of rights vouchsafed by the State and Federal Constitutions."

the next column, on the same page, he further says:

> "The amended bill seeks a cancellation of the special assessments that have been levied against the described lands of the plaintiffs from year to year up to the time of filing suit and to restrain a continuation of these

levies. It is alleged that the effect of these levies is to take the property of the plaintiffs without due process of law and is a denial of the equal protection of the law because the assessments are grossly in excess of the benefits; that the assessments cannot and have not enhanced the value of plaintiffs' lands; that the drainage of the district was not completed but abandoned as to some of the described lands; and as an example it is also alleged that Sections 4, 5 and 6 of Tp. 2, So., R. 23 E., according to the reclamation plans, were to be ditched at an estimated cost of $554.40 per section and the ditches were never cut but assessment benefits against each of the sections were entered for more than $20,000 per section and plaintiffs' property is being taken or sold to satisfy or pay these alleged grossly excessive assessments on lands possessing a value of approximately $5 per acre."

"Counsel for petitioners admit, for the purpose of a ruling on the demurrer, these well-pleaded facts, * * *."

It is true that many of the attacks on the Drainage District taxes were based upon State law such as, for example, the three-year statute of limitations pleaded in Section III of the bill (R. 9); also the insufficiency of the original decree purporting to create the district as pleaded in Section V of the bill (R. 18); also the insufficiency of the notice to confirm assessments of benefits, as complained of in Section VII of the bill (R. 29). We cited in the bill and in the briefs to the Supreme Court of Florida many decisions of the Supreme Court of Missouri to the effect that the decree and the notice were jurisdictional in character and were ineffective to include Plaintiffs' lands within the District. The Florida drainage law was largely copied from the Missouri Statute of 1913. The majority opinion, however, precluded any consideration of those State statutory questions on the grounds of supposed acquiescence on the

part of former owners. We shall assume for the purposes of this petition that such non-Federal ground of decision was adequate to dispose of the attacks based upon State statutory law, but we shall not concede that such non-Federal ground of decision was adequate to dispose of the attacks based upon organic rights secured by the Fourteenth Amendment, especially since the majority opinion did not recognize that the bill asserted such organic rights.

Important Federal questions were presented by the bill, Section II, R. 3, Section VI, R. 24, Section VIII, R. 33, Section XII, R. 54, Section XIII, R. 59, Section XIV, R. 64, and Section XV, R. 69.

The Federal questions presented by the cited sections of the bill and based upon the negative decision of the Supreme Court of Florida will be analyzed and pointed out under the heading QUESTIONS PRESENTED hereinafter set forth.

Concluding this summary statement of matters involved, we contend that the non-Federal ground of "acquiescence on the part of those who could have protested" resorted to by the majority opinion of the Supreme Court of Florida was without "fair and substantial support" as applied to any of the Federal questions asserted by the petitioners in their bill.

> *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478; *Lawrence* v. *State Tax Commission,* 286 U. S. 276; *Ocean Beach Heights v. Brown Crummer Inv. Co.,* 302 U. S. 614; *Ancient E. A. O.* v. *Michaux,* 279 U. S. 737, 745.

We contend further that when the averments of the bill were admitted by the attacking motions there was no basis left by presumption or otherwise that the Petitioners lost their "fundamental rights" asserted in the bill, by waiver

or acquiescence. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 307, 81 L. Ed. 1093, 1103, opinion by Mr. Justice Cardozo. *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 82 L. Ed. 1461, 1466, opinion by Mr. Justice Black.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 237 Judicial Code, as amended by Act February 13, 1925, now 28 U. S. C. A., Section 344. The opinion (R. 120) and judgment (R. 132) of the Supreme Court of Florida directing the Chancellor to dismiss the bill of complaint and dated April 4, 1944, were final in character. Petition for rehearing (R. 133) was filed April 17, 1944, and by order of the Supreme Court of Florida dated May 17, 1944 (R. 150), was granted in part and later, on to-wit, August 1, 1944, denied. (See order of denial R. 150). Thereafter, on to-wit, August 8, 1944, the Petitioners filed in the Supreme Court of Florida a motion for leave to file an extraordinary petition for rehearing (R. 152). Said last mentioned petition was, on September 15, 1944, denied by order of the Supreme Court of Florida (R. 154). On the 27th day of October, 1944, Petitioners filed in this Court a petition for extension of time within which to file petition for writ of certiorari and supporting brief, and on October 27, 1944, Mr. Justice Black made an order granting said last mentioned petition and extended the time for filing this petition for writ of certiorari to and including December 1, 1944.

Questions Presented

Upon the record and the opinions of the Supreme Court of Florida, as above explained, several important Federal questions are presented as follows:

1. WHEN THE SUPREME COURT OF FLORIDA SO CONSTRUED AND APPLIED THE GENERAL DRAINAGE STATUTE OF FLORIDA AS TO PUT STATE TAX TITLE GRANTEES AND STATE TAX CERTIFICATE OWNERS IN PRIVITY WITH FORMER OWNERS, MAKING SUCH PRESENT OWNERS SUBJECT TO WAIVER AND ACQUIESCENCE THAT MAY HAVE EXISTED AS AGAINST SUCH FORMER OWNERS, DID THE COURT CAUSE THE DRAINAGE LAW TO IMPAIR THE OBLIGATIONS OF THE TAX DEED GRANTS CONTRARY TO THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION AND DID SUCH DEPARTURE FROM PRIOR OPINIONS OF THE SUPREME COURT OF FLORIDA ON THAT SUBJECT OPERATE TO TAKE THE PROPERTIES OF THE TAX TITLE PETITIONERS WITHOUT DUE PROCESS OF LAW AND WITHOUT EQUAL PROTECTION OF THE LAWS CONTRARY TO THE FOURTEENTH AMENDMENT?

Section II of the bill as amended (R. 3) sets up what properties were acquired by several of the Petitioners through State tax deeds and that such deeds were issued after advertisement made to the highest bidders in 1927, 1928, 1929, 1930 and 1937—ten, fifteen and twenty years after the district was organized. It is further alleged (R. 6) that said tax deeds were based upon tax certificates issued for general State, county, school and road purposes; also that when each of the bond issues of the district was put out the law then in force made such general taxes paramount to all Drainage District taxes and, consequently, any enlargement of drainage taxes to a parity with general taxes by virtue of an Act of 1927, or otherwise, was a mere gratuity for such bonds. Finally, it is alleged (R. 8):

> "That in any event the grantees of said tax deeds through whom these plaintiffs now claim as aforesaid

> received independent titles from the State to the lands described in said tax deeds severally, wholly unaffected by anything done or omitted to be done by any of the former owners of said lands. That * * * Macclenny Turpentine Company and Nellie C. Bostwick claiming through said tax deeds in manner aforesaid, are entirely free and have the clear legal right to attack the validity of all such drainage taxes upon all the grounds hereinafter set forth in this amended bill."

These claims of new and independent titles were based upon prior decisions of the Supreme Court of Florida such as *Stuart* v. *Stephanus*, 94 Fla. 1087, 114 So. 767, decided December 1927, and *Dean* v. *Kane*, 106 Fla. 814, 143 So. 656—second headnote. In *Stuart* v. *Stephanus* the Court, among other things, said:

> "If the tax deed is valid, the former title can neither assist nor prejudice the tax title. The tax grantee takes a complete and perfect title by another right, by a new, independent, and paramount grant."

The Court then cited prior decisions of the Supreme Court of Florida and also two decision of this Court, namely, *Hefner* v. *Northwestern Mutual Life Ins. Co.*, 123 U. S. 747, and *Hussman* v. *Durham*, 165 U. S. 148. The *Hefner* case and the *Hussman* case were both Iowa cases. The Supreme Court of Florida, nevertheless, accepted both decisions construing the Iowa law as applicable in Florida, and the above quotation from *Stuart* v. *Stephanus* is substantially as this Court said in the *Hefner* case. In *Hussman* v. *Durham*, also accepted by the Supreme Court of Florida, this Court said:

> "* * * under such a tax law as exists in Iowa there is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from but in antagonism to the former. The holder of the latter is not a privy in estate with

the holder of the former. Neither owes any duty to the other, nor is estopped from making any claim as against the other."

The majority opinion of the Supreme Court of Florida in this case departs from these accepted rules of law and now comes to the rescue of the Baldwin Drainage District and its bondholders by asserting a contrary rule of privity which operates to impair the rights and obligations which these Petitioners thought they had acquired pursuant to said prior decisions of the Florida Supreme Court and of this Court. *Louisiana* v. *Pillsbury*, 105 U. S., 278, 295, 26 L. Ed. 1090, 1096; *Anderson* v. *Santa Anna Township*, 116 U. S. 356, 361-362, 29 L. Ed. 633, 635. The doctrine of new and independent titles presumably still holds good in Florida as against all parties save Drainage Districts and bondholders of Drainage Districts. If so, we have one rule established by this case to protect Drainage Districts but an entirely different rule applicable to tax titles as against all other parties. Therefore, the effect of the decision of the Supreme Court of Florida on this question is to deprive these petitioning tax title owners of their properties without due process of law and without equal protection of the laws.

2. Did the supreme court of florida deprive petitioners of a fair hearing contrary to the due process clause of the fourteenth amendment when the court disregarded allegations of the bill admitted by the attacking motions and based its decision on vague assumptions as to what had been the conduct of prior owners?

The majority opinion of the Supreme Court of Florida, supporting the sixth headnote—18 So. (2d) text 796, shows that the Court assumed as true an objection stated in one of the attacking motions, namely, that no former owner

had voiced any objection to the organization of the District, the assessment of benefits, the levy of taxes or any of the acts now challenged or that any of their successors had protested until the filing of the present bill. The Court then announced that the position of the movants was sound. The next paragraph begins with the word "Evidently." In the same paragraph we find the sentence

> "It is fair to presume that their predecessors in title, the persons owning the lands from the time the District was created until these moneys were expended, did not contest formation of the District."

The next sentence begins with the word "Doubtless" and in the second column of the same page the language is

> "It would be futile here to detail the many opportunities given any disgruntled land owners to contest."

By this course of reasoning, the Supreme Court of Florida, in effect, based its decision upon pure conjecture as to what had been the conduct of former owners. We need call attention to only one section of the bill to demonstrate that the Court disregarded what was alleged in the bill and admitted by attacking motions. That section is Section XIV, beginning R. 64. The first thing alleged in that section is that as early as October 7, 1918, Saucer & Company, through which Macclenny Turpentine Company claims title to Sections 6, 7 and 30, complained that drainage work up to that time constructed had created flood conditions causing injury without any benefits and, thereupon, the Board of Supervisors passed a resolution recognizing the justness of the complaint and eliminating Section 6 altogether from drainage taxes. That is only one of the Examples of protest set forth in Section XIV of the bill. The bill further shows that the District from that time up to

the time this suit was filed took no steps within twelve months, or at any other time, to bring any suit to enforce annual levies of assessments for debt service and maintenance which it continued to make against Section 6 and other lands contrary to the resolution of the Supervisors. Having made the protest and the Supervisors having passed such a resolution and the District having done nothing to enforce taxes for about twenty-five years, the property owners were justified in assuming that the District would never undertake to enforce taxes against areas damaged by flooding or against areas where there had been complate abandonment, as exemplified by Exhibits 8, 9 and 10 of the bill. To arrive at a judicial opinion by such assumptions and conjecture outside of the record and contrary to the record clearly constitutes depriving these suitors of their property without due process of law contrary to the Fourteenth Amendment. This Court so held in respect to rules and decisions by the Ohio Public Utilities Commission in the case of *Ohio Bell Tel. Co.* v. *Public Utilities Commission,* 301 U. S. 302, 306, 307, 81 L. Ed. 1093, 1102-1103.

In the case of *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, this Court held, as stated in the first and second headnotes, as follows:

> "1. Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiscence in their loss."
>
> "2. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

The Supreme Court of Florida disregarded this rule also. Moreover, as we shall point out in connection with the averments contained in Sections VIII, XII and XIII of the bill, former property owners never had any notice and there was never any hearing and there was never any

opportunity to be heard with respect to the changes which the Supervisors undertook to make in the original decree creating the District and the changes which they undertook to make with reference to the plan of reclamation, as evidenced by Exhibits 8, 9 and 10 to the bill. On the contrary, the Supervisors carefully refrained from filing any petition with the Court, from giving any notice of such changes, from calling for the appointment of any Commissioners to make reassessments of benefits, and from publishing any notice to confirm any reassessment of benefits. All the allegations of those three paragraphs of the bill, which were admitted by the attacking motions, show the absence of such hearing and the absence of any opportunity to object and yet the Supreme Court of Florida, basing its decision upon conjecture, concludes that former owners should have objected and that all of the present Petitioners, including the tax title owners, are bound by the failure of such former owners to object. So it is that the majority opinion of the Supreme Court of Florida, in effect, deprived the Petitioners of the very fundamentals of due process.

3. DID CHAPTER 6458, LAWS OF FLORIDA 1913, VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, WHEN SO CONSTRUED AND APPLIED AS TO INCLUDE WITHIN A SINGLE DRAINAGE DISTRICT FOUR SEPARATE, DISTINCT AND UNRELATED WATERSHEDS, AND WHEN THEREAFTER SO APPLIED AS TO SPREAD COMMON BURDENS ON THE LANDS IN THE WESTERN WATERSHED OF THE DISTRICT FOR MONEY SPENT OR WASTED IN OTHER WATERSHEDS WHOLLY WITHOUT BENEFIT TO THE LANDS IN THE WESTERN WATERSHED?

This question is predicated upon the rule stated in *N. C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415, 79 L. Ed. 949, 955:

> "A statute valid as to one set of facts may be invalid as to another."

Section VI of the bill lays ample predicate for the question last above stated. That section shows how the lands of the Petitioners are all situated in the Western watershed of this Drainage District and that the District as a whole contains four separate, distinct and unrelated watersheds. It is pointed out that this fact appeared upon the face of the reports made by the Engineer to the Supervisors and by their report, in turn, made to the Court at the time the decree confirming assessments of benefits was made. It is also shown that the same fact of four separate and distinct watersheds appeared from Federal topography maps in existence and available. It is charged in the outset of the section (R. 24), that the Circuit Court of Duval County had

> "no jurisdiction or power either under the State Drainage Law of 1913 or under the State or Federal Constitutions to enter said decree of January 19, 1916, including the lands of these respondents (Petitioners here) in a single drainage district * * *".

It is next charged (R. 24) that the lands existing in the four distinct watersheds were wholly separate and apart from each other to such an extent

> "that it required at least four systems of drainage to effectuate any sufficient drainage of the lands situated in said several watersheds."

Also, (R. 24-25)

> "That the lands in said several watersheds were wholly unconnected and unrelated to each other so much so that the lands in one of said watersheds had no common interest with lands in another watershed * * * That expenditures however large or great for a drainage system in one of said watersheds could not be and were not of any benefit to lands in any other of said four watersheds, all with the result that the lands included within the boundaries of said purported District and lying in said several watersheds

> were non-contiguous in physical conditions, non-contiguous as to flow of water and outlets, non-continguous as to interests and non-continguous as to plans of drainage or improvements which might have been proposed or provided for the improvement and reclamation of the lands situated in said watersheds severally."

It is further pointed out from the Engineer's report made part of the record in the proceedings wherein the decree purporting to create the District was entered, that the Engineer reported regarding the watershed in Township 2 South, Range 23 East (see R. 26) that

> "the general shed of the water from this Township is to the north and northwest. There is a fairly well defined though small uplift approximately on the east line of the Township."

In the same section of the bill, it is further shown that the Florida statute was copied largely from the Missouri Drainage and Levee Law which sought a remedy against *water as a common enemy from a common source,* and that where such conditions existed a *common burden is justified.* Section VI of the bill then specifically charges (R. 27):

> "These plaintiffs further say that they are advised and believe and so allege that if said General Drainage Law be construed as warranting or authorizing the inclusion of such four separate and distinct watersheds wholly unrelated in interests in the various ways aforesaid, necessitating imposing upon all the lands in such an area common burdens for whatever improvements might be made in any part of such an area, then said Statute and all provisions thereof undertaking to vest such authority were void because contrary to the due process and equal protection clauses of Section 12 of the State Bill of Rights and in violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution."

That section then further alleges that in the subsequent history of the district large sums of money were wasted or spent on projects in other watersheds of the district which were of no possible benefit to the lands of the Plaintiffs (Petitioners here) anywhere in Township 2 South, Range 23 East; that said large expenditures of money, as particularly thereafter shown, resulted from illegal changes in the plans of reclamation, illegal construction contracts and other matters over which neither the Plaintiffs nor prior owners had any control. Yet common burdens resulting therefrom and from the putting out of the second bond issue and the third bond issue were spread over the lands of the Plaintiffs (Petitioners here) by annual tax levies from year to year, all (R. 28)

> "with the result that these plaintiffs have been deprived of their said properties without due process of law and without equal protection of the laws, contrary to the due process and equal protection clauses of the State and Federal Constitutions."

It is a well-settled rule that only those injured by an unconstitutional statute or an unconstitutional application of a statute may complain. The allegations last above referred to are applications of that rule. The injurious effects of the application so made of the statute are further elaborated in Section XII of the bill, beginning R. 54.

This Court, in many early leading cases, pointed out that the only constitutional justification for a special improvement district, such as a drainage district or an irrigation district, was a *common benefits* to all the lands within a given district, so as to make the several landowners in a sense co-tenants with respect to benefits in order to justify the spreading of *common burdens.* Such decisions of this Court are *Wurts* v. *Hoagland,* 114 U. S. 606; *Head* v. *Amoskeag,* 113 U. S. 9; *Fallbrook Irr. Dist.* v. *Bradley,*

163 U. S. 112, 163, and *Ocean-Beach Heights* v. *Brown-Crummer Invest. Co.*, 302 U. S. 614. In *Hagar* v. *Reclamation District*, 111 U. S. 701, Mr. Justice Fields, quoting and applying *Louisiana* v. *Pillsbury*, 105 U. S. 278, laid down the following rule applicable to drainage or reclamation districts:

> "The rule that he who reaps the benefit should bear the burden must in such cases be applied."

The question now under discussion is one concerning fundamental rights of the Petitioners. The presumption of non-waiver exists under the rule stated in *Johnson* v. *Zerbst*, supra. The making of numerous protests by owners in the Western watershed is actually set forth in detail in Section XIV of the bill (R. 64). The lack of any notice or hearing and the lack of any opportunity to be heard with respect to the very great changes in the plans of reclamation that occurred in February 1918 are set forth in Section XII of the bill (R. 54). The injury of spreading common burdens for moneys spent in other watersheds and for bond issues in an effort to construct drainage improvements in other watersheds, wholly without benefit to the lands of Petitioners, is continuing from year to year and will continue unless injunctive relief is granted. Section XVI of the bill (R. 74) expressly avers that the position of the Drainage District and its bondholders has not changed and has not been harmed by any act or omission to act on the part of these Petitioners. The majority opinion of the Supreme Court of Florida said nothing about the Federal question last above stated and undertook to dispose of the case on the ground of supposed acquiescence on the part of former owners, but, as previously pointed out, such resort to such supposed non-Federal ground for deciding the case was without "fair or substantial support", as applied to the facts and circumstances

pleaded in this case and admitted by the attacking motions.

4. Do the facts well pleaded in sections VIIII, XII and XIII and related sections of the bill show that the district supervisors have from year to year confiscated petitioners' properties without any hearing and without any opportunity for hearing to petitioners or their predecessors in title, all contrary to the due process clause and equal protection clauses of the fourteenth amendment?

Section VIII of the bill (R. 33) shows the arbitrary, capricious and confiscatory character of the assessments of benefits originally reported by the Commissioners in August, 1916. Section VII of the bill (R. 29) shows that after public notice those assessments were confirmed by court order of October 4, 1916, but that section of the bill by the order copied (R. 32) shows that the assessments were confirmed on the basis of the reported and contemplated benefits

> "accruing to all lands in said Baldwin Drainage District by reason of the execution of the plan of reclamation aforesaid."

Section XII of the bill (R. 54) shows material amendments to the decree creating the district, except for taxation purposes only, and material amendments to the plans of reclamation but without any notice, without any hearing and without any authority from the court, as required by Sections 39 and 46 of Chapter 6458, Laws of Florida 1913, which, as amended by Act of 1917, now appear as Sections 1491 and 1500 C. G. L. of Florida, and appear as Sections 298.07 and 298.27 Florida Statutes Annotated 1941. Section XII of the bill also shows that there was no pretense of any reassessments of benefits as required by the statutes

last cited, nor was there any court confirmation of such reassessments of benefits after such changes in the original decree and in the original plans of reclamation. Nevertheless, the Supervisors continued to use the old assessments of benefits reported in August, 1916, as the basis for levying annual installment taxes for bond service and annual pretended maintenance taxes beginning in 1924. The result was that there was never any assessments of benefits as applied to the changed decree and changed plans of reclamation and there was never any public hearing with respect thereto and there was never any court confirmation of such reassessed benefits. Therefore, as applied to the situation created by the resolution of the Board of Supervisors on February 13, 1918, undertaking to make such changes, the assessments of benefits complained of in Section VIII of the bill (R. 33) are still unreported and still unconfirmed by any court order and are open to all the attacks levelled against the same in Section VIII of the bill.

First of all, it is shown by that section that the Commissioners failed in many respects to perform their duties, as required by law. They did not view the premises. They made up an office report after collaboration with the District Engineer. They did not obey what is now Section 1463 Compiled General Laws, that is to say, they failed to assess such benefits as would accrue to each governmental lot, etc.,

> "from a carrying out and putting into effect the plan of reclamation theretofore adopted."

They proceeded to apply an arbitrary formula which assumed that no acre of land in the Drainage District would receive less than a minimum benefit of $25.00 and that no acre of land in the district would receive a benefit of more than $40.00, and then they pretended to make variations

between those two limits according to whether the land from the engineer's report appeared to be in a swampy area or a ridge area. Their distribution of assessments ranging from $25.00 per acre to $40.00 per acre was exemplified by the Township Plat for Petitioners' watershed—Exhibit 7 of the bill.

Section VIII of the bill contains many illustrations of the arbitrary and capricious character of the assessments, such, for example, as shown (R. 37 and R. 38 and 42) with respect to Sections 4, 5 and 6 of Petitioners' watershed. As to those three sections, it is pointed out there was to be one small ditch for each discharging into a dead-end on the boundary of the district at a cost for each ditch of $554.00, and yet the pretended assessments of benefits for each of these sections was over $21,000.00, more than *forty times* the contemplated cost of the ditch for each such section. To make it still worse, the changes aforesaid by the Supervisors on February 13, 1918, and exemplified by the map—Exhibit 8 to the bill, called for the entire elimination of those three small ditches, and this fact is set forth in Section XII of the bill. That left those three entire sections outside of the district for all purposes except taxation purposes, and yet the Supervisors from that time forward up to the present continued to use the amounts of the assessed benefits stated in Section VIII of the bill (R. 37) and shown on the Township Plat, Exhibit 7, for those three sections, as the basis for annual levies of 18 mills for debt service and 4 mills for pretended maintenance. In the concluding part of Section VIII of the bill (R. 43) it is alleged that:

> "* * * said pretended assessments of benefits cannot be justified from any standpoint of law or fact and yet the supposed Supervisors of the District have since the attempted confirmation of said assessments continously used the same as the basis for applying each and every attempted levy for payment of said bonds

and for maintenance purposes, with the result that each and every levy so made up to and including the levy for 1942 has operated to deprive these plaintiffs of their said properties without due process of law and without equal protection of the laws, contrary to due process and equal protection clauses of the State and Federal Constitutions."

The nature of the changes in the original decree and in the plans of reclamation are fully set forth in Sections XII of the bill, beginning R. 54. That section first exemplifies what was the original plan of reclamation by Exhibit 4 attached thereto, which shows the location and number of the proposed ditches. Exhibit 7-A of the bill mentioned in Section VIII (shown as Exhibit 3, R. 79) shows the profile and contemplated cost for each of the ditches in the Western watershed, as contemplated by the plan for that watershed shown on Exhibit 4 (R. 80). In the right-hand column of Exhibit 7-A is tabulated the aggregate assessed benefits for each Section in that watershed and put there for purposes of comparison with the estimated cost of the drainage ditch or works for each Section.

Section XII of the bill further exemplifies the three maps proposed by the Engineers in November, 1917, and later February, 1918, adopted as the revised and amended plans of reclamation for the three Townships of the District. Copies of those maps are shown as Exhibits 8, 9 and 10 of the bill (R. 82, 83, 84). The nature of the eliminations and changes are then briefly described in the bill as also shown by the tables appearing on the left-hand side of each map. It is next shown (R. 56) that the Supervisors on February 13, 1918, passed a resolution undertaking to adopt said revised plans and amendments and, thereafter, they made a new construction contract without competitive bidding and contrary to the statute for further work to be done pursuant to said changed plans, particularly on the "C" system of canals exemplified by Exhibit 9. It is then

alleged (R. 57) that all these changes and amendments in the plans of reclamation were so great and material they could not have been lawfully made without complying with Sections 1491 and 1500, Compiled General Laws. The material parts of those Sections are then pointed out and partially quoted. Those Sections of the law, in substance, required that when said changes were made the same procedure had to be gone through as that provided for the organization of a drainage district in the first instance. It was necessary for the Supervisors to file a petition with the court to authorize the desired changes; thereupon, new Commissioners had to be appointed to reassess benefits. When they made a report, a new published notice had to be given for the confirmation of the reassessed benefits and then a court order approving the same, if the showing warranted such order; but none of these things were done and no notice whatsoever for a hearing was given and no hearing permitted. The statute, by the requirements of Sections 1491 and 1500 Compiled General Laws, undertook to assure to property owners due process of law as guaranteed by the Fourteenth Amendment. After the changes were made, one McCarthy, a banker, procured a further cost-plus contract without competitive bidding by virtue of his money control of the Supervisors. All this is set up in Section XI of the bill, beginning R. 51, and, thereupon, he spent in other watersheds, than that of the Petitioners, the remainder of the first bond issue of $300,000.00 and caused two other bond issues to be put out by the Supervisors, the second for $150,000.00 and the third for $110,000.00. It is further shown by Section XII of the bill (R. 57-58) that the Supervisors falsified their records in order to put out said bond issues without any authority of the court and without any notice to the public, as required by the statute, and those two bond issues were never confirmed by any validation order of the court so that the

property owners had no opportunity to make any fight against the validity of those two bond issues. Concluding such a history of the changes and what followed in the wake thereof, Section XII of the bill (R. 59) said:

> "Plaintiffs further say that notwithstanding all the aforesaid unauthorized changes and amendments to said plan of reclamation and notwithstanding the unauthorized issuance of the second and third bond issues the Supervisors from 1918 to 1942 inclusive annually undertook to levy instalment taxes based upon the original assessments of benefits made and reported by the Commissioners August 29th, 1916, as aforesaid."

Section XIII of the bill (R. 59) points out that beginning in 1922 down to date the Supervisors made only aggregate levies of installment taxes for all of the three bond issues, including the second and third illegally put out in the manner set forth in Section XII of the bill, and that the assessment books turned in to the County Tax Collector called for aggregate collections. It is then further alleged in Section XIII (R. 62):

> "Plaintiffs now further say that no part of the moneys arising from said second bond issue or said third bond issue was ever expended or used in the Deep Creek-St. Marys River watershed where plaintiffs' lands are situated as aforesaid."

Again on the following page (R. 63) it is alleged:

> "Plaintiffs now further aver that not a dollar of the moneys so spent or wasted on said "C" system of canals under said illegal contract and under illegal bonds issued therefor ever benefitted the lands of the plaintiffs in the western township one iota and it was not possible for plaintiffs' lands to receive any benefit therefrom due to the fact that the plaintiffs' lands were in a separate and distinct watershed and non-contiguous in the many respects set forth in Section VI of this bill * * *"

Then Section XIII of the bill (R. 63) concludes with the following language:

> "The plaintiffs now say that such an application of the general drainage law as shown by the aforesaid facts operated to take the properties of the plaintiffs situated in said western watershed contrary to the due process clauses and equal protection clauses of the State and Federal Constitutions. That if said Chapter 6548, Acts of 1913, by its terms warranted such application of the law then these plaintiffs say that the Statute itself is unconstitutional for the reasons last above stated."

The majority opinion of the Florida Supreme Court gave no heed whatsoever to the subject matter of Sections VIII, XII and XIII of the bill, as above explained. That opinion also failed to take any notice of the lack of hearing to property owners concerning the changes made in the original decree and plans of reclamation and failed to take any notice of the lack of any opportunity for hearing or of the actual falsification of records to prevent notice and hearing and yet the conclusion of the court was that the bill must be dismissed because of "acquiescence on the part of those who could have protested".

As applied to such a situation, we contend that the rules laid down in *Browning* v. *Hooper*, 269, U. S. 396, and *Chesebro* v. *Los Angeles, etc. District*, 306 U. S. 459, are applicable. In *Browning* v. *Hooper* the following rule was stated in the sixth headnote (70 L. Ed. text 331):

> "6. Where a road improvement district is created by mere petition of taxpayers, and there was no legislative determination that any included property would be benefitted by the improvement, notice to property owners and an opportunity to be heard are essential to due process of law in the taxing of the assessment."

The same rule was adhered to in the *Chesebro* case, 306 U. S. text 464, 83 L. Ed. text 926.

The case of *Risty* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 378, 389, 70 L. Ed. 642, 651, is very pertinent. The ninth headnote of this case (L. Ed.) reads:

> "9. Nonaction by persons owning lands outside a drainage district while proceedings to repair the ditch are in progress does not estop them from contesting an assessment against their property where they could have had no notice of the proposal to assess their lands until publication of notice of the apportionment of benefits."

So here no estoppel or acquiescence could operate against Petitioners or former owners when the Supervisors falsified their records to avoid complying with what are now Sections 1491 and 1500 Compiled General Laws of Florida.

In *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 72 L. Ed. 1140 (third headnote—L. Ed.) it was held:

> "One who acted in ignorance of the facts is not irrevocably estopped by his act."

To like effect is *Johnson* v. *Zerbst*, 304 U. S. 458, *supra*.

5. WHEN IT APPEARS BY SECTION XIV OF THE BILL, (R. 64 AND OTHERWISE), THAT THE DRAINAGE DISTRICT NEVER PUT INTO EFFECT ANY PART OF THE DRAINAGE WORKS AND WHOLLY ABANDONED MANY MATERIAL PARTS OF THE PLANS DESIGNED TO BENEFIT PETITIONERS' PROPERTIES, LEAVING THEIR PROPERTIES IN THE SAME OR WORSE CONDITION THAN BEFORE, WAS IT AND IS IT CONSISTENT WITH DUE PROCESS AND EQUAL PROTECTION OF THE LAWS TO CONTINUE THE IMPOSITION OF DRAINAGE TAX BURDENS ON PETITIONERS' LANDS FOR THE LIQUIDATION OF NON-NEGOTIABLE AND UNCONFIRMED BOND ISSUES FOR MONEY WASTED UNDER ILLEGAL CONTRACTS IN OTHER WATERSHEDS?

Section XIV of the bill, beginning R. 64, tells the principal story in answer to this question. It is pointed out that property owners in Petitioners' watershed began making protest of flood conditions from what drainage im-

provements had been constructed in that watershed as early as October 7, 1918, which was only a few days after Wills & Son and McCarthy had obtained their cost-plus contract for further construction in other parts of the District, as set up in Section XI of the bill, beginning R. 51. Such protests began also before the second or third bond issue was put out for moneys wasted in other watersheds. The Supervisors passed a resolution October 8, 1918, providing that Section 6 in Petitioners' watershed would not be burdened with any more drainage taxes due to the flooding thereof. Again, on March 27, 1919, further complaints were made of the ineffectiveness of what had been done in Plaintiffs' watershed. Again, on April 15, 1920, (R. 65) further protests were made and resolutions passed by the Supervisors recognizing the ineffectiveness of the works in that watershed and recognizing that some four thousand acres of land (principally now owned by Macclenny Turpentine Company) had been flooded and not benefited. The flooding of that area was mentioned in the case of *Duval Cattle Company* v. *Hemphill*, 41 Fed. (2d) text 436, although that area was not involved in the Duval Cattle Company suit. Then, again, on October 7, 1923, the situation was further reviewed by the Supervisors as per their Minutes quoted in the bill (R. 66), but no relief was given. Shortly thereafter the District proved to be insolvent and a Receiver was appointed by the Federal Court in May, 1924, which receivership also proved to be a failure and, after it had continued for a period of about ten years, the Federal Court discharged the Receiver and dismissed all undisposed of tax foreclosure suits. While the receivership was in progress, the Supervisors employed one George W. Simons, Jr., to make a careful survey of all of the drainage works in the District in order to know what actually existed and the condition thereof. Mr. Simons made his report, as per Exhibit 11 to the bill, and he presented maps in connection with his report as per

Exhibit 12 to the bill. Those maps of Simons, Exhibit 12, (R. 90-A) showed all of the eliminations proposed by the Engineers as per Exhibits 8, 9 and 10 of the bill and many more in addition, including the total abandonment of Section 19 of Township 2 South, Range 23, now owned by Macclenny Turpentine Company, and including a partial abandonment of Sections 2 and 3 of the same Township; also Section 24, now owned by the Plaintiff, Mrs. Bostwick. Simon's report also showed the very great change in the "C" system of canals as first exemplified by Exhibit 9 to the bill. His report pointed out that the "C" system was an utter failure and stopped at a dead-end about one thousand feet from the Northern boundary of the District after having been changed so as to divert water from some five or six Sections of land South of the Seaboard Railroad Northward through the "C" system rather than Eastward into McGirt's Creek on the Eastern boundary of the District. Section XIV of the bill concludes by charging that the District was under a continuing obligation to carry out and put into effect an effective system of drainage before the property owners were obligated to pay any taxes and that to keep their properties in the District and to continue levying taxes thereon was contrary to the principles enunciated in prior decisions of the Supreme Court of Florida such as *Cosby* v. *Jumper Creek Drainage Dist.*, 3 So. (2d) 356, and cases from other States. The Supreme Court of Florida, however, in this case gave no heed to such showing of facts, all admitted by the attacking motions, and directed the bill to be dismissed in its entirety.

We believe the rule announced by this Court in *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, 60 L. Ed. 393, first headnote reading as follows, is applicable:

> "1. The contention that a state law as administered and justified by the highest court of the state violates the Federal Constitution presents a Federal question

> which will support a writ of error from the Federal Supreme Court to the state court, although the state law as written is not attacked."

In the *Myles* case the island owned by the Salt Company was initially put in the District for taxation purposes only, whereas here the lands now owned by the Petitioners were kept in the District purely for taxation purposes only and those taxes are sought to be collected to liquidate obligations created for moneys wasted and paid out to a banker-contractor under an illegal contract for works in other watersheds wholly unrelated to the watershed in which the Plaintiffs' lands were situated. See also *Georgia R. & E. Co.* v. *Decatur*, 295 U. S. 165, 79 L. Ed. 1365, last headnote.

6. WAS IT OR IS IT CONSISTENT WITH DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO LEVY AND CONTINUE TO LEVY ANNUAL MAINTENANCE TAXES AGAINST THE LANDS OF PETITIONERS:

(A) WHEN NO ORIGINAL CONSTRUCTION WAS EVER PUT INTO EFFECT;

(B) WHEN MANY AREAS OF PETITIONERS' LANDS WERE WHOLLY ABANDONED;

(C) WHEN MANY AREAS OF PETITIONERS' LANDS WERE DAMAGED BY FLOODING AND NEVER BENEFITED;

(D) WHEN THERE NEVER WAS ANY PRETENSE OF MAINTENANCE IN THE DISTRICT;

(E) WHEN SUCH PRETENDED MAINTENANCE TAXES AS WERE COLLECTED DURING THE PERIOD OF THE FEDERAL RECEIVERSHIP WERE DIVERTED TO THE PAYMENT OF ATTORNEYS' FEES AND COURT COSTS IN THE PROSECUTION OF DELINQUENT TAX SUITS AGAINST OTHER LANDS?

Section XV of the bill (R. 69) tells the story about the levy of pretended maintenance taxes beginning in 1924, the same year that the Federal Receiver was appointed. The

construction work in the District stopped about September 1920. From then until the appointment of the Receiver no pretense of maintenance was made. Beginning in 1924, the Supervisors started levying 4 mills per annum on the amounts of supposed benefits originally assessed and reported by the Commissioners in August, 1916, that is to say, as to lands where benefits were assessed and reported up to $40.00 per acre, there was annually assessed 16 cents per acre per year for supposed maintenance. This continued through 1930, at which time the maintenance levies dropped down to 3 mills per annum on the original amounts of the assessed benefits. Section XV of the bill points out many reasons why the maintenance taxes were wholly void, including those summarized in the question last above, and the concluding sentence of Section XV (R. 74) asserts that such levies of maintenance taxes

> "for said insolvent and defunct district, were wholly arbitrary, and amounted to a spoliation of plaintiffs' properties."

That conclusion is borne out by the facts pleaded in Sections XII and XIV of the bill previously analyzed. We need not refer to the showing made in those two sections beyond again calling attention to the fact that, as appears by Exhibit 8 adopted by the Supervisors in their resolution of February 13, 1918, the ditches contemplated for Sections 4, 5 and 6 were wholly abandoned and, as appears by the Simons' map—Exhibit 12 to the bill—no ditches were ever dug in those three sections nor was any ditch dug in Section 19 and those which were dug in Sections 2 and 3 were short and stopped at a dead-end. In all such areas there was never any original construction much less any maintenance; besides, the four thousand acres mentioned in Section XIV of the bill (R. 66), chiefly belonging to Petitioners, was annually flooded and damaged with no

pretense of maintenance at any time since any ditches were dug, and yet the Supreme Court of Florida ruled that the bill in its entirety, including the attack upon such maintenance taxes for the past and for the future, must be dismissed.

Section XV of the bill did not specifically invoke the protection of the due process and equal protection clauses of the Fourteenth Amendment, but, in order to leave no doubt on that subject, several of the grounds embraced in the petition for rehearing specifically raised that question as to the maintenance taxes.

We now call attention to grounds 8, 9, 10 and 11 of the petition for rehearing (R. 135). Each of those grounds begins with the language

> "Is it consistent with due process and equal protection of the laws"

to impose maintenance taxes under specified conditions referred to in each of said grounds. The record shows that on May 17, 1944, the Court granted the petition for rehearing in part and ordered oral argument thereon for June 13, 1944; therefore, the petition for rehearing containing said grounds 8, 9, 10 and 11 became part of the record made before the Supreme Court of Florida and may be resorted to for the purpose of showing that the Federal question was presented to the Supreme Court of Florida. After having granted in part that petition for rehearing, the Court finally denied the same on August 1, 1944, and reaffirmed the prior opinion and judgment handed down April 4, 1944.

Section XVI of the bill (R. 74) shows that the District has continued to be insolvent and is now dominated and controlled by the two bondholders who claim to own $520,000.00 of its bonds out of a total of $560,000.00, and that they bought their bonds at five to ten cents on the dollar

beginning in the year 1937 after a majority of the bonds were past due and all of the matured coupons in default. All of these matters are admitted by the attacking motions and, therefore, there cannot be any possible lawful basis for either past or future levies of maintenance taxes, none of which would go to the now controlling bondholders. The past and continuing levies of maintenance taxes under the facts shown by this bill are the plainest sort of spoliation of property.

> *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478, 485, 60 L. Ed. 392, 396, last paragraph of the opinion.

As above noted, the opinion which the Supreme Court of Florida adheres to in this case was rendered April 4, 1944, but, on May 9, 1944, rehearing denied June 2, 1944, the Court decided the case of *Smith* v. *City of Winter Haven,* now reported in 18 So. (2d) page 4, and in that case the Court had the following to say in response to the City's contention that the property owner was estopped by past acquiescence from having a cancellation of past taxes and an injunction against future levies:

> "A municipality's power to tax for benefits is not bounded by its cosmic ambition or the superlative inducements of its chamber of commerce but by its present or reasonably present capacity to replace the taxes exacted with a commensurate benefit. *When the relation between the taxes exacted and benefits conferred is not apparent, there is no basis whatever to support the tax.* The fact that one on whom an unlawful tax is imposed pays it over a period of years before he 'squeals' might be evidence that his family tree had its genesis in the loins of the stoics but it certainly would not be a peg on which to hang estoppel. It would be more logical to contend that appellants were entitled to recoupment. *Persons adversely affected by it*

> *may raise the defense of laches but it certainly could not be available to those who are unjustly enriched by it.*" (Italics ours.)

This decision is entirely inconsistent with the acquiescence theory put forth by the majority opinion in the case at bar. As applied to the enforcement of past maintenance taxes or future maintenance taxes for this District, the logic of the Smith case certainly should be applied if the Petitioners are to have the protection to which they are entitled under the Fourteenth Amendment.

The continued annual levies of installment drainage taxes for debt service purposes and of pretended maintenance taxes, when there is no maintenance and was never any original effective construction, amounts to continued and recurring trespass and infringement upon the Petitioners' properties, severally. Under these circumstances, the situation is not unlike that which obtains where the owner of a patent infringed upon permits, such infringement to continue for a considerable period of time, and then invokes injunctive relief to prevent further infringement. In such case, the rules were stated by this Court in *Menendez, etc.*, v. *Holt*, 128 U. S. 514, 32 L. Ed. 526, as follows:

> "Mere delay or acquiescence by the owner cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself."
>
> * * * * * * *
>
> "Where there is no pretense of abandonment, delay in bringing suit may preclude recovery of damages for prior infringement, but will not destroy the right to prevention of further injury."

The Petitioners here are not asking for any accounting and return of drainage taxes previously paid. They are demanding relief against illegal taxes heretofore levied but

still unpaid and they are demanding relief against future levies of the same character. Therefore, the rules quoted from the Menendez case should apply.

Reasons Relied Upon for Allowance of Writ of Certiorari.

A. The rule of privity between State tax title grantees and former owners announced by the majority opinion of the Supreme Court in this case is in conflict with prior decisions of the Supreme Court of Florida in such cases as *Stuart* v. *Stephanus,* 94 Fla. 1087, 114 So. 767, *supra,* and in conflict with the decisions of this Court in *Hussman* v. *Durham,* 165 U. S. 148, *supra.* Moreover, the rule of property so changed by the opinion complained of impairs the tax title grants of Petitioners and all other tax titles granted to properties situated in Drainage Districts of the State of Florida.

B. The Florida Supreme Court's use of assumption and conjecture in arriving at the conclusion of acquiescence on the part of former owners sufficient to bar Petitioners of any right to be heard on the merits of the well-pleaded allegations of their bill was a violation of the due process clause of the Fourteenth Amendment contrary to principles enunciated by this Court in *Ohio Bell Tel. Co.* v. *Public Utilities Commission,* 301 U. S. 302, 306, 307, *supra,* and *Johnson* v. *Zerbst,* 304 U. S. 458, *supra.*

C. The majority opinion of the Supreme Court of Florida, by upholding the validity of Chapter 6458, Laws of Florida 1913, as applied to the inclusion of four separate and distinct watersheds in one Drainage District and as applied to the spreading of common burdens upon the lands of the Petitioners in the Western watershed without common benefits, put said statute in conflict with the due process and equal protection clauses of the Fourteenth

Amendment and in conflict with many decisions of this Court such as *Head* v. *Amoskeag*, 113 U. S. 9, *supra; Wurtz* v. *Hoagland*, 114 U. S. 606, *supra; Hagar* v. *Reclamation District*, 111 U. S. 701, *supra; Ocean Beach Heights* v. *Brown-Crummer Inv. Co.* 302 U. S. 614, *supra*, and in conflict with Missouri decisions construing the drainage law of that State, from which the drainage law of Florida was largely copied. *Mound City Land & S. Co.* v. *Miller* (Mo.), 70 S. W. 721, 60 L. R. A. 190, 200, 208; *Elsberry Dist.* v. *Harris* (Mo.), 184 S. W. 89, 92; *Duncan* v. *St. Johns Levee & D. Dist.*, 69 Fed. (2d) 342 (8 C. C. A.).

D. The Petitioners who are tax title owners, and the Petitioners and their predecessors who were non-tax title owners, have never had their day in court nor any opportunity therefor, as applied to the assessments of benefits used as a basis for taxes levied against their lands, severally, after the changes and amendments to the original decree and to the plans of reclamation complained of in Sections XII and XIII of the bill. The Supreme Court of Florida, in effect, denied their right to such day in court. Such application of the statute by the Supervisors and by the Supreme Court of Florida deprives Petitioners of their properties without due process and without equal protection of the laws secured by the Fourteenth Amendment and enunciated in such decisions of this Court as *Browning* v. *Hooper*, 269 U. S. 396, *supra; Chesebro* v. *Los Angeles, etc., District*, 306 U. S. 459, *supra*. The position so taken by the Supreme Court of Florida last above mentioned is also in conflict with the decision of the Fifth Circuit Court of Appeals in the *Florida* case of *Ecker* v. *Southwest Tampa Storm Sewer D. Dist.*, 75 Fed. (2d) 870, and in conflict with decisions of other State Supreme Courts on this question. *Armistead* v. *Southworth* (Miss.), 104 So. 94, first and second headnotes, and *Thomas* v. *Dallas County*

Levee Imp. Dist. (Tex.), 23 S. W. (2d) 325, third headnote, and *Kelleher* v. *Joint Drainage Dist.* (Iowa), 249 N. W. 401.

E. The decision of the Supreme Court of Florida, by sustaining all the drainage tax levies of the past and by refusing any injunctive relief as to the future, notwithstanding the complete abandonment of all proposed drainage improvements in large areas of the Petitioners' lands and notwithstanding damage by flooding and no benefit whatsoever to other large areas of Petitioners' lands, has authorized the taking of Petitioners' properties without due process and without equal protection contrary to the Fourteenth Amendment and contrary to such decisions of this Court and of other courts as *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, *supra; Huey* v. *Bd. of Drainage Commissioners* (Ky.) 15 S. W. (2d) 451; *Whitcher* v. *Bonneville Irr. Dist.* (Utah), 256 Pac. 785; *Smith* v. *Enterprise Irr. Dist.* (Ore.), 85 Pac. (2d) 1021.

F. The decision of the Supreme Court of Florida sustaining pretended maintenance taxes past and future, notwithstanding all of the well pleaded facts set forth in Sections XIV and XV of the bill, is contrary to the Fourteenth Amendment and contrary to the late decision of the Florida Supreme Court itself in *Smith* v. *City of Winter Haven*, 18 So. (2d) 4, *supra*, and contrary to *Johnson* v. *Zerbst*, 304 U. S. 458, *supra*.

G. The majority opinion of the Supreme Court of Florida entirely misconstrues and misapplies the decision of this Court in *Tulare Irr. Dist.* v. *Shepard*, 185 U. S. 1, and if such misconstruction and misapplication of this Court's decision is not corrected much injustice and injury will follow in the wake thereof in the determination of subsequent similar controversies by the Courts of Florida.

II. If the denial of Federal rights complained of in this petition is not corrected by this Court, then all properties situated in the Baldwin Drainage District and other numerous drainage districts in the State of Florida in like situation will continue to be dead properties unproductive of tax revenues to support the State, county and school governments and with no substantial value to any property owner in such districts. On account of these aspects this case is of large public importance in the State of Florida.

I. The United States District Court for the Southern District of Florida, Jacksonville, Division is now awaiting this Court's decision of this case before said District Court makes distributions of the large sums of money now in the registry of the court awarded for lands taken for airfield purposes in six or seven condemnation suits covering lands in the Baldwin Drainage District. If the decision of the Supreme Court of Florida stands uncorrected then the Baldwin Drainage District or rather the two defendant bondholders in this case will get practically the total of all the awards made in all those condemnation cases, and property owners will get practically nothing because the accumulated claims for drainage taxes made by the Drainage District amounted in most instances to several times the value of the lands as awarded by the juries in said several condemnation cases. If injustice was done by the decision of the Supreme Court of Florida in this case, that injustice will immediately be multiplied many times in said condemnation cases because said District Court deems itself bound by the determinations of the Supreme Court of Florida in dealing with questions of State law applicable to said Drainage District.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the Supreme Court of Florida commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings had in this cause and that the judgment and decree of said Supreme Court of Florida in this cause be reversed by this Court and that the Petitioners may have such other and further relief in the premises as to this Court may seem just.

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 714

MACCLENNY TURPENTINE COMPANY, A FLORIDA CORPORATION, ET AL,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, A PUBLIC CORPORATION, ET AL.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Opinion Below

The opinion of the Supreme Court of Florida filed April 4, 1944, and reaffirmed by the order of August 1, 1944, is in the transcript of record presented with this petition and brief at pages 113 to 120. That opinion has been reported as the case of Baldwin Drainage District, et al vs. Macclenny Turpentine Company, et al, 18 So. (2d) 792-802.

II

Jurisdiction.

A statement disclosing the basis of jurisdiction of this Court as contended for by the Petitioners is specifically set forth as part of the foregoing petition for certiorari, that

is to say petition for certiorari is sought pursuant to the terms of Section 237 Judicial Code, also 28 U. S. C. A., Section 344. Record references showing what happened subsequent to the filing of the opinion and judgment of the Supreme Court of Florida on April 4, 1944, are fully set forth in said jurisdictional section of the foregoing petition and need not be repeated.

III

Statement of the Matters Involved

The foregoing petition for writ of certiorari under the heading "Questions Presented" has stated in capitalized type six Federal questions presented by the record and as to which the Petitioners seek this Court's decision. The questions as so presented by the petition for certiorari are respectfully referred to as part of this supporting brief, the Petitioners deeming repetition unnecessary.

IV

Assignments of Error

1. The Supreme Court of Florida erred in so construing and applying the General Drainage Statute of Florida as to put State tax title grantees and State tax certificate owners in privity with former owners, making such present owners subject to waiver and acquiescence that may have existed against such former owners to such an extent as to bar the present tax title owners from having their well-pleaded facts and attacks contained in their bill determined upon their merits and in that behalf the Supreme Court of Florida impaired Petitioners' tax title grants and deprived Petitioners of due process and equal protection as guaranteed by the Fourteenth Amendment.

2. The Supreme Court of Florida erred in that said Court deprived the Petitioners of a fair hearing contrary to the due process and equal protection clauses of the Fourteenth Amendment when the Supreme Court of Florida based its decision upon vague assumptions and conjectures of what had been the conduct of prior owners and at the same time disregarded the well-pleaded facts of Petitioners' bill admitted by the attacking motions.

3. The Supreme Court of Florida erred in construing and upholding Chapter 6458, Laws of Florida 1913, in such manner as to warrant the inclusion within the Baldwin Drainage District of four separate, distinct and unrelated watersheds and as warranting the spreading of common burdens upon the lands of the Petitioners in the Western watershed of said District for bonds and moneys spent or wasted in other watersheds of said District, wholly without benefit to the lands of Petitioners, all contrary to the due process and equal protection clauses of the Fourteenth Amendment.

4. The Supreme Court of Florida erred in refusing to determine that the facts well pleaded in Sections VIII, XII, XIII and related sections of the bill were sufficient to show that the District Supervisors have from year to year confiscated Petitioners' property without hearing and without any opportunity for hearing to Petitioners, or their predecessors in title, all contrary to the due process clause and equal protection clause of the Fourteenth Amendment.

5. The Supreme Court of Florida erred in declining to hold that the well-pleaded facts of Section XIV and related sections of the bill, (showing that the Drainage District never put into effect any part of the drainage works and wholly abandoned material parts of the plans designed to benefit Petitioners' properties and left other properties

of Petitioners in the same or a worse condition than before) made out a case of taking Petitioners' properties without due process and without equal protection of the laws by the imposition of taxes complained of, especially when all parts of those taxes imposed for the second and third bond issues had to do with moneys wasted or spent in other watersheds of said Districts than the one where Petitioners' properties were situated.

6. The Supreme Court of Florida erred in sustaining the levy of past and future maintenance taxes upon the properties of Petitioners notwithstanding all the well-pleaded facts set up in Section XV of the bill and related sections.

7. The Supreme Court of Florida erred in misconstruing and mis-applying the decision of this Court in *Tulare Irr. Dist.* v. *Shepard*, 185 U. S. 1, in such manner as to bar the Petitioners, including tax title holders and tax certificate holders, from all right to a hearing on the matters well pleaded in their bill of complaint.

The foregoing assignments of error, 1 to 6, inclusive, constitute what we believe are the proper affirmative answers to questions 1 to 6 set forth in the foregoing petition for writ of certiorari under the general heading "Questions Presented." The seventh assignment of error is a restatement of one of the reasons contained in the foregoing petition for granting the writ of certiorari.

V

Argument

The foregoing petition for certiorari under the general heading "Questions Presented" stated six Federal questions raised by the record in this cause and following the

statement of each question the Petitioners presented an analysis of the record pertaining to each such question with citations of sustaining authorities. We believe that we cannot improve upon the exposition of the record on each such question as there presented. We believe also that sufficient authority was cited in connection with each such question to sustain the foregoing assignments of error 1 to 6, inclusive, and, therefore, we submit the discussion and authorities supporting those six questions as the Petitioners' argument in support of the aforesaid assignments of error 1 to 6, inclusive, without further enlargement and without further repetition.

The seventh assignment of error having to do with the application made by the Supreme Court of Florida of the *Tulare* case justifies some further discussion. For purposes of clarity, we shall restate the seventh assignment of error:

> "7. THE SUPREME COURT OF FLORIDA ERRED IN MISCONSTRUING AND APPLYING THE DECISION OF THIS COURT IN TULARE IRR. DIST. V. SHEPARD IN SUCH MANNER AS TO BAR THE PETITIONERS, INCLUDING TAX TITLE HOLDERS AND TAX CERTIFICATE HOLDERS, FROM ALL RIGHT TO A HEARING ON THE MATTERS WELL PLEADED IN THEIR BILL OF COMPLAINT."

In the several arguments before the Supreme Court of Florida, counsel for the Respondents laid great stress on the decision of this Court in *Tulare Irr. Dist.* v. *Shepard*, 185 U. S. 1. The majority opinion of the Supreme Court of Florida accepted the line of argument so made based on that case and rendered its decision accordingly. At the outset, we make observation that the decision in the *Tulare* case was confined to the particular facts in the record then before the Court. The best support of this conclusion is the fact that the *Tulare* case has only been cited once by this Court in all the years since that decision. That citation was in

Ocean Beach Heights, Inc. v. *Brown-Crummer Inv. Co.*, 302 U. S. 614, 619, on a point not here involved.

There are many reasons why the decision in the *Tulare* case is distinguishable and stands wholly apart from what is involved in the case at bar.

1. That was a suit against the irrigation district by certain bondholders to obtain a judgment on matured coupons. Here the suit is entirely of a different nature, namely, one by property owners attacking the validity of drainage tax assessments.

2. The bonds held by the plaintiffs in the *Tulare* case were general obligations of the district and fully negotiable because the Wright Act there involved and involved in the prior decision of *Fallbrook Irr. District* v. *Bradley*, 164 U. S. 112, gave the district power to levy general *ad valorem* taxes to whatever extent might be necessary to pay the bonds and interest thereon and the act had been construed by the Supreme Court of California as authorizing the issuance of negotiable bonds, whereas here, as pointed out in Section X of the amended bill (R. 47) it has been held by the Florida Supreme Court that drainage district bonds are "not general obligations" of such a district because they are payable out of a special fund which may never be adequate to pay them and in consequence are not unconditional promises to pay.

3. The opinion in the *Tulare* case expressly found that the complaining bondholders were *bona fide* purchasers of such negotiable bonds for "full value," whereas here the bondholders were not *bona fide* purchasers and paid only a nominal value, namely 5 cents to 10 cents on the dollar for the bonds after nearly all of them were long since in default and fully matured.

4. The bondholder plaintiffs in the *Tulare* case bought their bonds at the very outset of the irrigation project. Their money was used to develop the project. Here the bondholders purchased in the open market *caveat emptor* charged with knowledge of and subject to all equities existing in favor of landowners. *O'Brien* v. *Wheelock,* 184 U. S. 450, 492-496, 46 L. Ed. 636, 655-657.

5. The District as a defendant in the *Tulare* case undertook through its officers to repudiate the bonds owned by the plaintiffs after having put forth the bonds with appropriate recitals and after having received the plaintiff's money therefor, whereas the ground of attack was as found by this Court to be at the most an immaterial defect and mere irregularity, making their attack both incompetent and unsustainable. Not so as to the matters complained of in the several sections of the amended bill here.

6. The two landowner parties who intervened in the *Tulare* case and undertook to make common cause of defense with the irrigation district had received "full benefit" of the irrigation project with respect to their properties and had otherwise acquiesced and approved the project and the issuance of negotiable bonds to the plaintiffs for "full value." No such situation is presented by the amended bill here. Quite the contrary.

7. Many questions are presented by the amended bill here which were in no manner involved in the *Tulare* case. Such, for example, as the unauthorized changes in the plans of reclamation without any opportunity to be heard and without any reassessments of benefits. Also the *Tulare* case did not involve any tax title property owners who had acquired their titles direct from the State ten, fifteen to twenty years after the district was created.

The same counsel who now urges the proposition of acquiescence and estoppel did the same in *Ocean Beach Heights* v. *Brown-Crummer Inv. Co.*, 302 U. S. 614, but this Court answered that contention in this language:

> "The consent of owners of lands located beyond permissible limits of a municipality cannot be made to serve as would a statutory grant of power."

This Court has laid down many other rules applicable to the doctrines of estoppel and acquiescence which were entirely overlooked by the Supreme Court of Florida when that Court made its erroneous application of the *Tulare* case in the manner above pointed out. For instance, in the case of *Ketchum* v. *Duncan*, 96 U. S. 659, 666, 24 L. Ed. 868, 871, this Court said:

> "Moreover, it is necessary to notice who sets up this plea of estoppel. An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

In the case at bar, the Supreme Court of Florida entirely overlooked making any inquiry as to who were the parties urging estoppel on the ground of supposed acquiescence by former owners. The parties urging such matter were the Drainage District itself and the two speculating bondholders who did not come into the picture until 1937 when they began buying their present holdings at five to ten cents on the dollar and at that time all of the first $300,000.00 bond issue was past due and a very large part of the second and third bond issues were past due. Neither the District nor such bondholders were in any manner misled to their injury by what the Florida Supreme Court assumes may have been done or omitted "by those who could have protested." In this case the insolvent District has itself been in default of performance for about twenty-four years.

The same line of reasoning was restated in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 323, 80 L. Ed. 688, 698, as follows:

> "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities."

In the case at bar, Section XVI of the bill (R. 74) specifically alleges that neither the District nor any of its bondholders was ever prejudiced or caused to change position on account of anything done or not done by the Petitioners. The attacking motion to dismiss admitted those averments. Therefore, if any facts existed to the contrary it was requisite that showing thereof be made by answer.

Again in *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 77 L. Ed. 1140, the third headnote was as quoted page 24, supra. In the opinion supporting that headnote, the Court, among other things, said:

> "There can be no irrevocable estoppel when the truth has been withheld."

In Sections XII and XIII of the bill now before the Court, it is specifically alleged that neither the Petitioners nor their predecessors in title ever had any hearing or notice of the changes in the original decree which the Supervisors undertook to make and the changes in the original plan of reclamation which they undertook to make. On the contrary, the Supervisors falsified their records in order to avoid compliance with the statutes, namely what is now Section 1491 and Section 1500, Compiled General Laws of Florida. See in this behalf also the case of *Risty* v. *Chicago, etc. R. Co.*, 270 U. S. 378, quoted page 24, supra. Along the same line is the decision of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, first and second headnotes quoted page 11 supra.

There are still other parts of the bill in this case which negative any room for present consideration of estoppel or acquiescence on the part of the Petitioners or former owners. Section II of the bill shows the tax title ownerships derived from the State as an independent paramount source. Those tax titles were obtained from ten to twenty years after the Drainage District was organized. The State was not estopped by what former owners did and, there being no privity between the tax title grantees and such former owners, no conduct of such former owners could bind such grantees. That is the law laid down in the case of *Hussman* v. *Durham*, 165 U. S. 148, quoted page 8, supra.

As another illustration, it is alleged in Section IV-B of the bill (R. 14) that the Petitioner, Anna F. Stokes and the Petitioner, Mrs. Fouraker acquired title from their ancestor, J. T. Fouraker, who was the owner of the property described in that part of the bill at the time attempt was made to organize the District, but that said Fouraker had no notice of the application to form the District and no notice that assessments of benefits had been made and

> "that said Fouraker did nothing in his lifetime to recognize the validity of any of the proceedings relating to said District."

The attacking motion to dismiss admitted these allegations and yet the Supreme Court of Florida assumed the contrary.

On this subject of acquiescence, we may again call the Court's attention to the decision of the Supreme Court of Florida itself in *Smith* v. *City of Winter Haven*, 18 So. (2d) 4, quoted page 30, supra. That decision is in line with the numerous decisions of this Court above quoted and is altogether contrary to what was announced by the majority opinion in this case.

It is respectfully submitted that the Petitioners are entitled to the writ prayed for.

We appreciate the fact that on the Court's docket are now found many cases of National importance due to the progress of the war and war-time legislation. Nevertheless, it is important that fundamental rights of litigants be protected even in time of war so that when peace comes our social order will not be torn to pieces and we may return to our normal way of life without embarrassment over Court decisions that fail to give proper recognition of such fundamental rights.

We submit, further, that reasons A to I, inclusive, stated in the foregoing petition, for granting the writ of certiorari, are also good reasons why the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
Attorney for Petitioners.

(5312)

IN THE

Supreme Court of the United

October Term 1944

MACCLENNY TURPENTINE COMPANY, a Florida Corporation, et al.,
Petitioners,

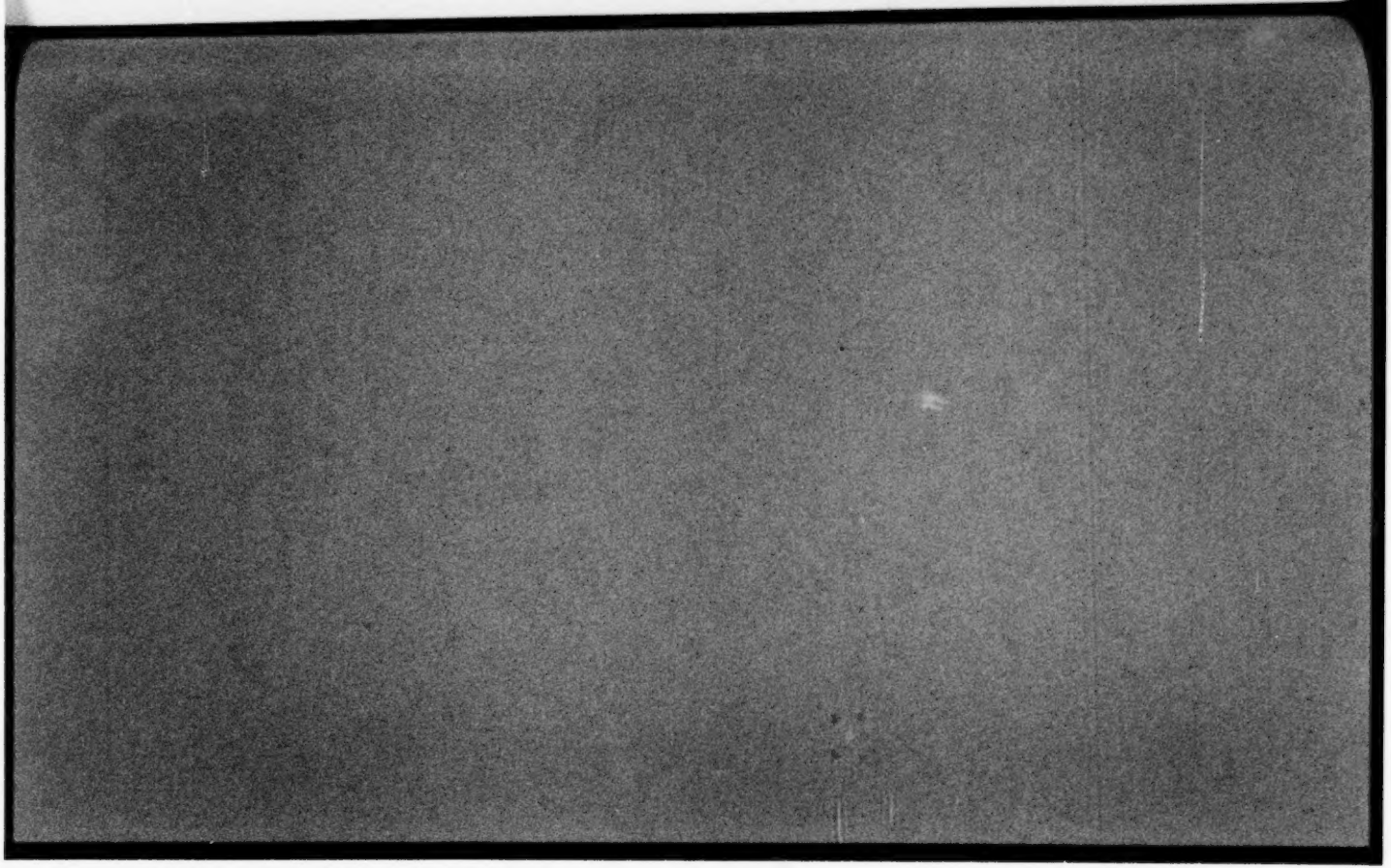
vs.

BALDWIN DRAINAGE DISTRICT, a public corporation, R. V. COVINGTON, A. W. INGLIS, and W. D. BRINSON, as Supervisors of Baldwin Drainage District, J. W. HARRELL, et al.,
Respondents.

No. 714

BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

GILES J. PATTERSON,
JOHN W. HARRELL,
Attorneys for Respondents.



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The Petition (page 6) says that

> "The jurisdiction of this Court is invoked under Sec. 237 J. C. as amended by Act, Feb. 13, 1925; now 28 USCA Sec. 344"

(See also page 38 of Petition). But the Petition does not make it appear that a question and decision which characterizes the State judgment as a reviewable one, appears in the Record.

Petition does not comply with the Rules of this Court.

Rule 12 of the Rules of this Court requires a statement disclosing the basis upon which it is contended that the Court has jurisdiction *specifying* the stage in the proceedings in the lower Court in which, and the manner in which, the Federal question was raised, the method of raising it, *the way in which it was passed upon by the State Court* and quotations from the record or a summary statement to support the assertion that the rulings of the State Court were of a nature to bring the case within statutory provisions "believed to confer jurisdiction on this Court". But the Petition makes no attempt to comply with this rule. It simply refers to Sec. 344, Title 28 USCA. It does include two short quotations from the majority opinion, but they relate to a non-Federal question. Sec. 344, Title 28 USCA (Par. b) lists the types of cases which this Court may review on a writ of certiorari to a State Supreme Court.

ONE

> "where is drawn in question the validity of a treaty or statute of United States".

No treaty or Federal statute is here involved.

TWO

> "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States".

No statute of Florida is here claimed to violate the Federal Constitution. Constitutionality of the General Drainage Law of Florida under which Baldwin Drainage District was established was sustained by the Florida Supreme Court in *McMullen* vs. *Newmar Corporation*, 100 Fla. 566, 129 So. 870, *Burnett* vs. *Greene*, 105 Fla. 35, 144 So. 208 and *Towns et al* vs. *State*, 102 Fla. 188, 135 So. 822 and by the Fifth Circuit

Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, 41 Fed. (2) 433, a suit involving the validity of this particular District.

THREE

> "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution or in a treaty or statute, or commission held, or authority exercised under the United States"

Only by inference can we assume that this is the basis upon which Petitioners contend jurisdiction exists in this case. Rule 38 of this Court requires that the Petition shall contain

> "a statement *particularly* disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, Par. 1); the questions presented; and the reasons relied upon for the allowance of the Writ. Only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered".

Since the Petition does not purport to comply with the requirements of Rule 12 and does not *particularly disclose the basis* of Petitioners' contention that this Court has jurisdiction, the Petition should be denied for failure to conform to these rules of the Court.

No Federal Question is Presented for Decision.

But our opposition to the issuance of the Writ does not rest solely upon Petitioners failure to comply with the Rules. On the contrary, if the Petition had been prepared in accordance with the Rules, it would have affirmatively shown that no Federal question is present and that the case does not come within the provisions of Sec. 344, USCA Title 28. This can be demonstrated by references to the Record and to decisions of this Court.

Only three times does the Bill of Complaint refer to the Federal Constitution.

(1) At the top of page 28, it is alleged that the inclusion of four watersheds in one drainage district and the levy of taxes to pay bonds of the District has resulted in depriving Petitioners of their property

> "without due process of law and without equal protection of law contrary to the due process and equal protection clauses of the State *and* Federal Constitutions."

(2) At the top of page 43; as a part of Sec. VIII of the Bill attacking the assessment of benefits, it is alleged that the use of the assessed benefits as a basis for taxes

> "has operated to deprive these plaintiffs of their property without due process of law and the equal protection of the laws contrary to due process and equal protection clauses of the State *and* Federal Constitutions."

(3) At the bottom of page 63, Petitioners allege that

> "such an application of the General Drainage Law as shown by the aforesaid facts operated to take the property of the plaintiffs situated in said western watershed, contrary to the due process clauses and equal protection clauses of the State *and* Federal Constitutions".

There is no specific reference to any particular section of the Federal Constitution and in every instance the charge is a violation of "State *and* Federal Constitutions". Neither the Petition nor the Brief attempts to relate the "Questions Presented" or the "Reasons Relied Upon" to the Complaint.

The Circuit Court order (pages 98 and 99 of the Record) contains no opinion. It granted Respondents' Motion to Strike Secs. III, V, VII, IX and XI of the Amended Bill, denied their Motion to Strike other sections and denied their Motion to Dismiss the Bill as a whole except as to the interests of plaintiff, Nellie C. Bostwick.

Both parties petitioned the Supreme Court of Florida for Writ of Certiorari; the principal opinion of that Court was signed by five justices, one being disqualified and one dissenting. (Pages 113 to 120 of the Record).

The State Supreme Court (p. 150 of the Record) ordered that the Order of the Circuit Court denying the Motion to Dismiss the Bill of Complaint as a whole be quashed and directed that Court to enter an Order dismissing the Bill.

The opinion of the State Court is a part of the Record.

> "It has always been held that this Court may examine the opinion of the State Court to ascertain whether a Federal question was raised and decided and whether the Court rested its judgment on an adequate non-Federal ground".

Indiana ex rel Anderson vs. *Brand*, 303 U. S. 95. *New York ex rel Bryant* vs. *Zimmerman*, 278 U. S. 63 and other cases cited in Note 58 Section 4989 Cyclopedia of Federal Procedure. In determining what questions were decided, this Court will not indulge in conjecture, implication or inference, to read a Federal question into a decision where it does not appear *in the Record that such a question was involved in the State Court's decision. Southwestern Bell Telephone Company* vs. *Oklahoma*, 303 U. S. 206, *Osborne* vs. *Clark*, 204 U. S. 565, *Burt* vs. *Smith*, 203 U. S. 129.

SUMMARY OF STATE COURT'S DECISION

The majority opinion of the Florida Court did not refer to the Federal Constitution. It discussed only non-Federal or State law and its decision rested solely on three non-Federal grounds;

(1) That the rights of purchasers of tax certificates and deeds were those defined by the law in force at the time Petitioners' rights were acquired, citing an early Florida case

and a late one. Since under the Amendment of 1927 to the General Drainage Law (quoted in the opinion) drainage taxes are

> "of equal dignity with taxes levied for State and county purposes",
> "they were not cancelled by the sale of property for State taxes and the issuance of certificates therefor".

(2) That the validity of the District (which was attacked upon thirteen enumerated points including the decree of incorporation, decree confirming benefits and other steps taken in the formation of the District, such as the levy of taxes, etc.) cou'd not be questioned collaterally in this proceeding.

In its decision in *State, by Watson, Attorney General, et al* vs. *Covington, et al*, 148 Fla. 42, 3 So. (2d) 521, where it had dismissed a quo warranto proceeding initiated by the state on the relation of Petitioners, the Court had held that the Baldwin Drainage District had

> "at least a de facto existence with jurisdiction and powers, pursuant to which contractual and other rights had been acquired and not fully discharged";

and dismissed the proceeding; referring to its former decision it said that it had

> "settled the point whether the District as such, should continue in existence, and we now redeclare that it had and has in any event de facto status rendering it invulnerable to direct, or of course, collateral attack".

Since the State could not make a direct attack by quo warranto, it logically held that Petitioners could not attack the District and the powers of its officials in this collateral proceeding.

Counsel for Petitioners was counsel for corelators in that proceeding and we presume will not deny that some of the Petitioners here were relators there.

(3) Because it had said in its opinion in the *Covington* case that

> "If individual corelators are entitled to relief upon the ground that *their lands* in the District have not been and cannot be in any way benefitted by being included in the drainage district, and taxation of such unbenefitted lands violates organic property rights *which have not been lost by acquiescence or otherwise*, the allegations of the information are insufficient, even if the relief can properly be obtained by quo warranto proceedings",

even though the grounds of complaint here were similar to those in that information, which the Court had held to be insufficient, it proceeded to determine whether individual "property rights" of Petitioners had been lost "by acquiescense or otherwise". (The last three words were italicized by the Court). It held that appellants had failed to show that the former owners of lands had made objections to the organization of the District, the assessment of benefits, the levying of taxes or to any of the acts now challenged

> "or that any of their successors protested until the filing of the present bill";

that because of the long period of time that had elapsed since the District was organized without any showing that the opportunities provided by statute for the protection of individual owners had been utilized, and because plaintiffs, "comparative strangers" to the title, had acquired their interests long after the bonds had been sold, the proceeds received and expended by the Supervisors, (agents of the land owners) it was now too late for plaintiffs to "repudiate the obligations of the District" in this proceeding.

These were the only questions considered and decided by the State Supreme Court. All of them relate to ques-

tions of State or general law. No Federal question was even mentioned.

SINCE STATE COURT'S DECISION RESTS ON NON-FEDERAL GROUNDS THE WRIT SHOULD NOT ISSUE

It is axiomatic that this Court has no jurisdiction of cases decided by a State Court other than those that come within the provisions of the Statute,- i.e., those that involve questions of Federal Law. Sec. 4972 Cyclopedia of Federal Procedure, *Waters, Pierce Oil Company* vs. *Texas*, 212 U. S. 86. The Record in the State Court must affirmatively show, expressly or by just and necessary inference that the Federal question was properly brought in question and presented for decision, and that the Federal question was *decided by the State Court* or that the decision of the Federal question was *necessarily involved in the determination of the question by the State Court. Southwestern Bell Telephone Co.* vs. *Oklahoma* supra. The parenthetical reference in Rule 38 to Rule 12, par. 1, clearly makes the requirements of Rule 12 applicable to Petitions for Certiorari. There is every reason why it should be so construed and no reason why it should not. The Court in *Broad River Power Co.* vs. *South Carolina ex rel Daniel*, 281 U. S. 537 cited many of the cases which are cited in this brief, although that was a Writ of Certiorari directed to the Supreme Court of South Carolina. See also *Fox Film Corporation* vs. *Muller*, 296 U. S. 208, which was a Writ of Certiorari to the Supreme Court of Minnesota. Numerous earlier cases are collated in that opinion. This record not only shows that no Federal question was set up or claimed in a proper manner and time, but that no such question was *decided by the State Supreme Court* either expressly or by necessary intendment. The opinion of the Florida Supreme Court is conclusive of this. The questions of State or general law,

which it did decide were adequate to support the judgment.

This Court has repeatedly held that, even though two questions be involved, one Federal and the other non-Federal, if the State Court does not decide the Federal question but bases its decree on the non-Federal one, its decision is not reviewable. It has applied that rule to cases where State Courts have held that parties have waived legal or constitutional rights, or that they were estopped by acquiescence. *Eustis* vs. *Bolles*, 150 U. S. 361 followed in *Rutland Railway Company* vs. *Central Vermont Railway Company*, 159 U. S. 630, in *Seneca Nation* vs. *Christy*, 162 U. S. 283 and in *Pierce* vs. *Somerset Railway Company*, 171 U. S. 641.

> "If it does not clearly appear upon which of the two grounds the judgment was based and a ground independent of the Federal question is sufficient in itself to sustain the judgment this Court will not take jurisdiction."

Lynch vs. *New York ex rel Pierson*, 293 U. S. 52 and cases cited in that opinion.

The rule has been applied by this Court to cases where drainage and irrigation district taxes and other special assessment proceedings are attacked in State Courts. *Enterprise Irrigation District* vs. *Farmers Mutual Canal Company*, 243 U. S. 157. In that case, as in this one, it was contended that the State Supreme Court had misconceived or misapplied the statute or common law of the State and thereby infringed the due process of law and equal protection of law clauses of the United States Constitution in the Fourteenth Amendment. This Court held that no Federal question was presented since the decision of the State Court rested on *estoppel in pais* which was an independent ground of judgment; that

> "the due process clause does not take up the laws of the several states and make all questions pertaining

> to them constitutional questions nor does it enable this Court to reverse the decision of the State Courts upon questions of State law."

The citations to this case are so numerous, especially in recent years as to render a list of them unnecessary. *McCoy* vs. *Shaw*, 277 U. S. 302, *Hebert* vs. *Louisiana*, 272 U. S. 312. Also *Pierce* vs. *Somerset Railway Co.*, supra.

In Petrie vs. *Nampa and Meridian Irrigation District*, 248 U. S. 154, where the State Court had decided a Federal question and an independent non-Federal one, the latter was held broad enough to sustain the judgment; therefore, no Federal question was presented.

In *U. S.* vs. *Hastings*, 296 U. S. 188, this Court held that where its jurisdiction had been invoked under writs of error or appeals from judgments of state courts, and it appeared from the Record that not withstanding the existence of a Federal question and its consideration and determination by the State Court,

> "the judgment rests upon a non-Federal ground adequate to support it",

it would refuse to review it.

A Florida case closely analogous to this is *Utley* vs. *St. Petersburg*, 292 U. S. 106. It was there held that since the Appellants had stood by without opposition while the street was being paved, had refrained from making use of the administrative and judicial remedies that were available, and had held aloof for nearly five years before invoking the aid of equity, the decision of the State Court that they had been guilty of laches and estoppel presented a non-Federal question which was genuine and adequate; that the decree of the State Court rested upon a non-Federal ground broad enough to support the non-Federal question and that this Court had no jurisdiction to review. In the

Baldwin District case the original property owners not only made no use of the numerous administrative and judicial remedies open to them, but none of them has ever brought an action attacking the validity of the District, its bonds or its taxes. The only attack made was by Duval Cattle Company in defense of an action by the Receiver of the District to foreclose the lien for drainage taxes. All its defenses were held insufficient by the Fifth Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra. The present suit is brought by persons who are strangers to the original title, all of whom acquired an interest in the lands six or seven years after construction was completed, at least ten years after the first issue of bonds was sold; some Petitioners interests were not acquired until twenty years afterward.

The Petitioners by their indiscriminate citation of authorities have confused what might have been rights of landowners to object in the proceedings by which the District was organized or constructed, and the rights of those same landowners now, twenty-five years after the bonds were sold without objection. Even constitutional rights guaranteed by the Fourteenth Amendment may be waived by parties or lost by their acts, or failure to act.

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right is not a Federal question".

Pierce vs. *Somerset Railway*, 171 U. S. 641; *Eustis* vs. *Bolles*, 150 U. S. 361; *Shepard* vs. *Barron*, 194 U. S. 553. The last cited case has been followed and cited by the Supreme Court of Florida in *Burnett* vs. *Greene*, supra, *Royal Indemnity Co.* vs. *Young and Vann*, 144 So. 532, and *Evans* vs. *Hillsborough County*, 135 Fla. 471, 186 So. 193. *See Abell*

vs. *Town of Boynton,* 95 Fla. 984, 117 So. 507, which was cited by this Court in *Utley* vs. *St. Petersburg,* supra.

Petitioners have rested their case upon the claim that tax titles which they acquired from the State were independent and paramount to the rights or liens of the District for taxes. This is a question of State law. The Florida Court held following its previous decisions, that the liens for drainage taxes

> "being of equal dignity with taxes levied for State and county purposes (they) were not cancelled by the sale of property for State taxes and issuance of certificates therefor".

See also *State* vs. *Everglades Drainage District,* 19 So. (2) 472 decided Oct. 20, 1944. The position of Petitioners is as the Florida Court holds no better, if it is as good as that of the original owners.

DISCUSSION OF "QUESTIONS PRESENTED" AND "REASONS" FOR ISSUE OF WRIT.

In the light of the foregoing, it seems unnecessary to reply at length to the various "Questions Presented" (pp. 7-32 Petition). They may be briefly disposed of. "Question One" complains of a change of decision by the Supreme Court of Florida. This Court holds that a change of judicial decision by a State Court does not present a Federal Question. *Tidal Oil* vs. *Flanagan,* 263 U.S. 444, *Great Southern Hotel Co.* vs. *Jones,* 193 U. S. 532, etc.

"Questions Two and Three" charge that the *action of the Florida Court amounted* to a violation of the Federal Constitution. This is not a Federal question. See *Enterprise Irrigation District* vs. *Farmers Mutual Canal Company,* supra.

"Questions Four and Five" entirely ignore the elements of acquiescence and laches that are present and the fact that the State Court's decision was based upon these questions of non-Federal law.

"Question Six" is disposed of by the admission (p. 29 of the Petition) that the Bill of Complaint did not assert that the levy of maintenance taxes violated the Fourteenth Amendment. Such a claim must be made at the earliest stage of the litigation. *(Olympia Mining Co.* vs. *Kearns,* 236 U. S. 211). It is raised too late where it is first presented on a petition for rehearing which is denied or dismissed by the State Court without opinion or without reference to the question. *Herndon* vs. *Georgia,* 295 U. S. 441 and numerous cases cited in Note 49, Sec. 4980 Cyclopedia of Federal Procedure.

The Florida Supreme Court granted the Petition for Rehearing (p. 150 R)

> "on the sole grounds set out in Par. 3 in the amended Bill of Complaint involving the question of the applicability of the statute of limitations in determining the issues in said Bill".

No opinion was written. The final judgment of the Florida Court (page 150) was that the opinion and judgment of the Court filed April 4, 1944,

> "be and is hereby reaffirmed and adhered to on rehearing".

Five Justices and a Circuit Judge concurred. That order was entered simultaneously with the filing of an opinion on a petition for rehearing in *Ideal Farms Drainage District* vs. *Certain Lands,* 14 So. (2d) 416, which held that the state general statutes of limitations did not apply to liens for drainage taxes.

All of the "Reasons Relied upon for Allowance of Writ

of Certiorari" except, G, H and I (pp. 34 to 35) are related to the so-called "Questions Presented". "Reason G" (p. 34) alleges that the Florida Court misconstrued *Tulare Irrigation District* vs. *Shepard*, 185 U. S. 1. The opinion of the Florida Court did not construe that opinion. It merely cited it by name. "Reasons H and I" are purely argumentative and present no questions of law.

CONCLUSION

Since this is the third time an application has been made to this Court to review decisions relating to this District, it is possible for the Court to refer to its records in *Krietmeyer* vs. *Brown*, Certiorari denied, 275 U. S. 496 (C.C.A. 5 opinion 19 Fed. (2d) 513) and *Bostwick* vs. *Baldwin Drainage District*, Certiorari denied, 319 U. S. 742 (C.C.A. 5 opinion 133 Fed. (2d) 1). The last named case was companion to this. The opinion of the Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra, also shows that many contentions here made by Petitioners were overruled in that case.

After the Government's Bill for Taking was filed in the Federal Court in 1941, Petitioners through the State's Attorney General, filed an information attacking the District and the authority of its officers; *State* vs. *Covington*, supra. That proceeding was dismissed. They then filed an answer in the condemnation suit. Their claims were there denied, although at the same time they had pending this suit in the State Court, and strenuously contended for what they asserted was the law of Florida. Now, the Florida Supreme Court has decided this case against them on Florida law, they are back in this Court urging that the decision of the Florida Court violates the Federal Constitution. Yet the only answer they make to the Florida Court's decision is that it "presumed" acquiescence. The

alternative to that would be a presumption that property owners had been diligent in the face of the record made by Petitioners here, in the record they made in the Florida Supreme Court in *State* vs. *Covington*, supra, and in the record they made in *Bostwick* vs. *Baldwin Drainage District*, and the opinion of the Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra.

The claim that "property" of theirs has been or will be "taken" is contrary to the Record. They bought tax titles, which did not cancel or destroy liens for drainage taxes. They still own the interest they acquired.

This short statement should be sufficient to show the real purpose of Petitioners:—not to protect themselves against a "taking" of *their* property, but to acquire by this proceeding that which they have never owned—namely, title to land free from drainage tax liens. This they could accomplish only by destroying the District and the property interests of its creditors, whose sole means of realizing anything upon their claims is through the exercise of the taxing power of the District.

The decision of the Florida Supreme Court applying the non-Federal principle of estoppel by acquiescence is in accord with *Tulare Irrigation District* vs. *Shepard*, which it cites, and with all other cases decided by that Court.

GILES J. PATTERSON,

JOHN W. HARRELL,
Attorneys for Respondents.

(7)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 714

MACCLENNY TURPENTINE COMPANY, A FLORIDA CORPORATION, ET AL.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, A PUBLIC CORPORATION, ET AL.

REPLY BRIEF FOR PETITIONERS

THOS. B. ADAMS,
Counsel for Petitioners.

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REPLY BRIEF FOR PETITIONERS

Statement

Respondents' brief presents nothing on the merits of petitioners' case. The whole effort of counsel for respondents is to shut off and prevent any consideration of the merits. The majority opinion of the Supreme Court of Florida likewise took a short cut and avoided any discussion or consideration of the merits.

Petition Does Comply With Rules of This Court

The contrary is argued pages 2 and 3 of respondents' brief. The argument is based on rule 12 upon the assumption that rule 12 is bodily incorporated into rule 38. Our

understanding is that each rule has a proper field of operation. The first sentence of rule 38 (2) specifies four requirements. The petition here has those four requirements. Nevertheless counsel for respondents contend that the "questions presented" and "reasons relied on" should all have been embraced in a "jurisdictional statement" such as contemplated by rule 12. A comparison of rule 38 with rule 12 shows no such intent. Rule 12 in setting forth the requirements of the "jurisdictional statement" includes, a, b, and c, requirements, also "a statement of the grounds upon which it is contended that the questions involved are substantial". This requirement is covered by the "questions presented" clause and the "reasons relied on" clause of rule 38. Therefore, the subject matter of those two clauses of Sec. 38 take the place in part of the "jurisdictional statement" called for by rule 12.

The opinion of the Supreme Court of Florida is cited and briefly analyzed pages 1 to 4 of the petition thus showing what was involved and how decided by the State Court.

The "Basis of Jurisdiction" statement page 6 of the petition cites the correct code section and the dates of the several orders of the Supreme Court of Florida, thus making it appear that the petition is timely. This brief statement of "Basis of Jurisdiction" is then followed by an amplified statement of "Questions Presented" and by a concise statement of "reasons relied on".

Six Federal Questions Are Presented

At page 3 of respondents' brief it is asserted "No Federal Question is Presented for Decision." Following that assertion, counsel on page 4 of their brief quote certain partial paragraphs of the bill of complaint as quoted on certain pages of the petition, but in so doing they omit other very important parts of the bill of complaint quoted in the

petition. They go so far as to assert near the bottom of page 4:

> "There is no specific reference to any particular section of the Federal Constitution."

Whereas after quoting certain parts of the bill at page 13 of our petition we then quoted an important paragraph from Section VI of the bill, R. 27, where it is specifically charged that if the general drainage law be so construed as warranting or authorizing the inclusion of such four separate and distinct watersheds wholly unrelated in interests in various ways, necessitating imposing upon all the lands common burdens for whatever improvements might be made in any part of such an area, then said Statute and all provisions thereof undertaking to vest such authority were void because contrary to the due process and equal protection clauses of Sec. 12 of the State Bill of Rights and:

> "In violation of the due process and equal protection clauses of the *14th amendment to the Federal Constitution.*"

Counsel for petitioners take no account of the well settled rules stated by this court in *N. C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 quoted page 12 of our petition to the effect that:

> "A statute valid as to one set of facts may be invalid as to another"

In Sec. VI of the bill of complaint as analyzed in our petition, the constitutionality of the general drainage laws was attacked as applied to the inclusion of four separate distinct and unrelated watersheds in one district and as applied to the subsequent spreading of common burdens upon petitioners' lands for large sums of money expended

or wasted in other watersheds without one penny's benefit to the lands of any of the petitioners. Such application of the law we contended and still contend violated the due process and equal protection clauses of the 14th amendment. The contention was plainly stated in the face of the bill R. 27 and R. 28, yet counsel for respondents assert no Federal question was presented. *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179.

At bottom page 2 of respondents' brief, two cases involving a different district are cited wherein it was held that the General Drainage Law of Florida was valid but that doesn't answer the attack here made as applied to the particular facts and situations shown by petitioners' bill. In the same connection, counsel cite at top page 3 of their brief, *Duval Cattle Company* v. *Hemphill*, 41 Fed. 2d 433, but again counsel omit to state what was presented by the record in that case. The opinion of the 5th Circuit shows that the principal defense relied upon by Duval Cattle Company was alleged payment of the drainage taxes in question. That defense was held insufficient for reasons stated in the opinion. The answer filed in that case also attempted to claim that the district was made up of noncontiguous areas due to the fact that the rights-of-way of the Seaboard Railroad and Atlantic Coast Line Railroad were not included in the district and that those rights-of-way crossed each other in such fashion as to create seven unconnected areas of land in the district. The court properly held there was no merit in that contention because the record showed that the drainage ditches were dug across those rights-of-way as much so as if they had not been there and that the rights-of-way did not otherwise prevent the lands on opposite sides of any particular piece of right-of-way from being contiguous, for drainage purposes. No attempt was made in that case to raise the question of separate and distinct watersheds or the imposition

of common burdens on each watershed for drainage improvements or monies wasted in other watersheds. That question now presented by Sec. VI of this bill has never heretofore been raised or passed upon by any court where a Florida drainage district was involved.

Each other question presented pages 7 to 31 inclusive of our petition clearly shows the presence of a Federal question which the petitioners are entitled to have reviewed by this court. This is very clear as to question 4 presented page 17 of our petition which is based upon sections VIII, XII, and XIII of the amended bill and the quotations therefrom such as found in the petition pages 19 to 23 inclusive. That question again attacks the application made of the statute. The Supreme Court of Florida evaded saying whether that application was good or bad. It simply disposed of the case by holding that the petitioners could not be heard because some former owner or owners in the distant past may have acquiesced by failing to bring such a suit as this one.

Non-Federal Ground of Alleged Acquiescence Is Without "Fair or Substantial Support"

The contrary of this proposition is vigorously urged pages 8 to 12 of respondents' brief.

We anticipated the contention of opposing counsel by the citation of four decisions of this court on that question at page 5 of our petition. The cases cited by opposing counsel, recognize the same rule stated in the cases cited by us. The only difference between us is whether the application of the rule to the record in this case means "thumbs up" or "thumbs down" on the issuance of the writ of certiorari. We think a brief analysis of the cases cited, pro and con will clearly show that the non-Federal ground resorted to by the Supreme Court of Florida did not have "fair or

substantial support", and therefore did not warrant the court's evasion of the Federal questions presented.

In *Enterprise Irrig. District* vs. *Farmers Mut. Canal Co.* 243 U. S. 157, 164-165, 61 Law Ed. 644, 649 this court stated the rule we think applicable in this case:

> "Our jurisdiction is plain * * * where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question."

In that case there was ample ground for holding that the complaining party was estopped by its prior conduct. Hence this court held that the non-Federal ground of estoppel was sufficient basis for the State Court's decision.

In *Petrie* vs. *Nampa & Meridian Irrigation District*, 248 U. S. 154, 63 Law Ed. 178, the State Court held that the attack which the plaintiff sought to make was *premature*. This court held that non-Federal ground adequate to support the court's decision.

In *Broad R. P. Co.* vs. *South Carolina Ex Rel. Daniel*, 281 U. S. 537, 74 Law Ed. 1023, the court stated the rule as follows:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court. Even though the constitutional protection invoked be denied on non-Federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

When that rule was applied, the court found that the non-Federal ground set up in the State court was adequate, hence the writ of certiorari was dismissed.

In *Utley* v. *City of St. Petersburg*, 292 U. S. 106, 78 Law Ed. 155, the appellants attacked the application of the well known "front foot rule" used as a means of apportioning the cost of paving improvements in front of the appellants' lands. This court held first that the Federal question asserted was not substantial because this court had in many prior decisions upheld the application of such a rule. In the second place, it appeared that the appellants had stood by without objection while their properties were being improved and that they had refrained from making use of remedies both administrative and judicial open to them while they knew their properties were being so improved. Then after a lapse of 5 years when the improvement was complete and municipal obligations incurred in connection therewith, they sought to attack the validity of the assessments. This court concluded that the non-Federal ground of estoppel set up by the Supreme Court of Florida was "genuine and adequate" to support the decision. Hence an appeal was dismissed. We have no such case at bar. Many sections of appellants' lands such as sections 4, 5, 6 and 19 in their watershed were entirely abandoned and no ditch was ever dug anywhere in their vicinity. Some 4000 acres of appellants' lands were annually damaged by flooding and never benefited. No ditch was ever made efficient in any lands in appellants' watershed because of no proper outlet. Appellants' predecessors in title, at least those not claiming through tax deeds, repeatedly protested as set forth in Section XIV of the bill about flood conditions and otherwise. No pretense of maintenance has ever been made in petitioners' watershed or anywhere else in the district. The supervisors as shown by Sec. XII of the bill by their resolution of February 13, 1918 secretly changed the original decree without authority of law as provided by what is now Sec. 1491 Compiled General Laws. At the same time they secretly changed the plans of reclamation in many

particulars such as wholly omitting many sections from any improvements whatsoever without any pretense of complying with what is now Sec. 1500 Compiled General Laws. They also secretly awarded a cost-plus contract to their banker friend who wasted large sums of money in other watersheds. They secretly put out two additional bond issues without making any record thereof and they actually falsified their records to prevent property owners from knowing what was going on. In doing all these things, the supervisors were acting purely as the agents of the Drainage District and not otherwise. *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179, 186. There was no standing by, and no receipt of benefits and no acquiescence with full knowledge as in *Utley* v. *City of St. Petersburg*. *Shepard* v. *Barrow* 194 U. S. 553 is distinguishable on similar grounds. See 48 Am. Jur. page 795, notes 18, 20 and 1.

One of the cases cited page 5 of our petition is *Ancient E. A. O.* v. *Michaux*, 279 U. S. 737, 745. There again this court stated the rule:

> "It is our province to inquire not only whether the right (Federal right) was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-Federal ground of decision having no fair support."

The State Court had, like the Florida Supreme Court here, undertaken to bar relief on the ground of laches but this Court said:

> "An attentive examination of the record discloses that not only the finding on the question of laches is without support in the evidence, but that the evidence conclusively refutes it."

When a similar examination of the record is made in this cause, it will appear as pointed out in our petition that the supervisors of the district, in cooperation with the dis-

trict engineer and their banker friend McCarthy, were diligent in concealing from property owners what was actually going on, in the matter of changing the plans of reclamation, in changing the original decree and in making new cost-plus contracts without any competitive bidding and in wasting money in other watersheds, and in issuing successive issues of bonds without any application to the court for validation.

It is axiomatic that there can be no acquiescence or waiver without knowledge of sufficient facts to take effective measures to protect one's interest.

In *Pence* v. *Langdon*, 99 U. S. 578, 581; 25 Law Ed. 420, 421 this Court said:

> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

This is the rule accepted by a great number of American and English cases. See: 29 American English Encyclopedia of Law 2d Ed. page 1093 subject "Waiver" 13th footnote.

We think the correct rules on the subject of acquiescence, waiver or estoppel are also stated in 48 Am. Jur. subject "Special or Local Assessments", Secs. 296 and 311, pages 783 and 796 as follows:

> "The general rule is that objections to a special or local assessment relating to original want of jurisdiction in a body conducting the proceedings leading to an assessment, or to jurisdictional defects and irregularities in such proceedings, or other matters voiding the assessments, are not subject to the operation of an estoppel of or waiver by a property owner, whether

> the estoppel is sought to be based on the signing of the petition for the improvement, a failure to pursue a prescribed remedy within the time limited, failure to appear or to make objections at a hearing, specification of other objections, failure to appeal, acquiescence, payment of an assessment or any part thereof, connecting with the improvement in question, or other ground, * * * Where * * * an apportionment or calculation is unfair and arbitrary so that it voids the assessment, the general rule that voidness of an assessment is not within the operation of an estoppel of the property owner has been applied."

In the case at bar, the averments of Sees. VI, VIII, XII, XIII and XIV of the bill—all admitted by the attacking motions—show that the assessments complained of were utterly void and not merely voidable. Also that they were wholly unfair and arbitrary and that the same character of assessments are continuing year after year and will continue in the future unless some relief is granted.

In the case of *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478; cited page 5 of our petition was a suit of the same character as the one at bar. There the plaintiff sought to restrain the Drainage District from collecting drainage taxes levied during a period of four years prior to the filing of the bill. The Appellee district and its commissioners sought to dismiss the writ of error contending that the plaintiff had not sufficiently asserted a Federal right, that under the law of Louisiana such an attack could not be made in the absence of a special averment of fraud which was not pleaded and that the decision was grounded upon the local law adequate to support the decision. This Court brushed aside both contentions and delivered an opinion which has stood out as a beacon light in similar cases ever since. *Georgia R. & E. Co.* v. *Decatur*, 295 U. S. 165, 170 Ed. 1365, 1369; *Duncan* v. *St. Johns Levee & D. Dist.*, 69 Fed. 342 (8 C. C. A.).

At bottom of page 11 of respondents' brief the case of *Pierce* v. *Somerset Railway*, 171 U. S. 641, is cited and quoted for the proposition that the State Court may destroy any right of review on a Federal question, by resorting to the device of placing its decision on a non-Federal ground. In the *Pierce* case, however, the non-Federal ground was ample to warrant the decision sought to be reviewed, therefore, when so understood that decision is consistent with later decisions announcing the rule as above quoted from *Broad R. P. Co.* v. *South Carolina supra*, and *Ancient E. A. O.* v. *Michaux supra*, and also stated in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282, 76 Law Ed. 1102, 1107.

"Questions Presented" Are Severally Meritorious

At page 12 of respondents' brief counsel assert that Question 1, page 7 of our petition is without merit because the contract cannot be impaired by change of judicial decision within the meaning of the contract clause of the Federal Constitution. It may be that *Louisiana* v. *Pillsbury* and the *Anderson* case cited page 9 of our petition are inadequate to sustain that phase of question 1 because it does appear from the decision delivered by Chief Justice Taft in *Tindal Oil Co.* v. *Flanagan*, 263 U. S. 444, 453, that *Louisiana* v. *Pillsbury* and another case were distinguished on the ground that a subsequent statute was so construed as to impair a prior contract. Even so, the second headnote of the *Flanagan* case (68 Law Ed. 383) shows that if the act of February 17, 1922 had not been repealed by the act of 1925 jurisdiction would attach where property rights had vested under prior decisions and then the property rights were destroyed by subsequent decision. There is, however, a second phase to question 1, and that is that the decision of the Supreme Court of Florida, as applied to the tax title owners who acquired independent titles from

the State, in effect deprived them of all right to be heard and therefore amounted to a denial of due process of law, contrary to the 14th amendment. It is perfectly competent to claim that the decision of the Supreme Court of Florida denied such Federal right and that contention could not have been presented until after the decision was rendered and after we had exhausted our efforts to obtain correction by petitions for rehearing. This situation was observed by Chief Justice Taft in the *Flanagan* case. It has frequently been held by this court that such a decision of the highest court of the state may constitute in and out itself a denial of due process, contrary to the 14th amendment. See: *Georgia R. & Electric Co.* v. *Decatur*, 295 U. S. 165, 171; 79 Law Ed. 1365, 1370, citing many prior decisions beginning with *Saunders* v. *Shaw*, 244 U. S. 317, 319; 61 Law Ed. 1163, 1165.

Question 1, page 7 of our petition, Reason A page 32 of our petition and the first assignment of error page 38 of our petition and brief, all present this latter element of denial of due process of law resulting from the Supreme Court of Florida's change of decision destroying a rule of property theretofore long established and denying to petitioners any right to be heard because of alleged privity with former owners all contrary to the prior decision of the Supreme Court of Florida and contrary to the prior decisions of this court. That particular phase of the decision of the Supreme Court of Florida also emphasized the point that the alleged non-Federal ground of acquiescence was without "fair or substantial support" especially as applied to tax title owners and tax certificate owners.

Question 2, page 9 of our petition, Reason B, page 32 of our petition, and assignment of error 2, page 39 of our supporting brief, deal with the same subject. That is to say that the effect of the Florida Supreme Court's opinion as to both classes of ownerships—tax title ownerships as

well as non-tax title ownerships—was to deny a hearing, contrary to the due process and equal protection clauses of the 14th amendment. That point is well supported by the opinion of this Court in *Ohio Bell Telephone Company* v. *Public Utilities Co.*, 301 U. S. 302, 306, 307, also by *Georgia R. & Electric Co.* v. *Decatur*, 295 U. S. text 171 *supra*, and cases there cited.

Question 3, page 12 of our petition and Reason C page 32 of our petition and assignment of error 3, page 39 of our supporting brief, all deal with what is charged as being an unconstitutional application of the General Drainage Law of the State in consequence of which petitioners were and will be, deprived of their properties without due process and without equal protection of the laws as guaranteed by the 14th amendment. Pages 12 to 16 of our petition show that this Federal question was clearly and distinctly presented by the bill. Cases cited pages 15 and 16 of our petition, clearly show the merits of the point. The decisions there cited are in harmony with the general trend of authority, as recently stated in 48 Am. Jur. subject "Special or Local Assessments," page 580 Sec. 21 as follows:

> "The general rule is that a special or local assessment is justified and authorized by, and is unconstitutional and invalid without, a special benefit to the property assessed, resulting from a special or local public improvement. The assessment is regarded as compensation for such special benefit."

In support of this text, decisions of this court and of practically every court in the Union are cited.

Question 3 and the averments of the bill cited and quoted pages 12 to 16 of our petition, show that the supervisors of this district acting secretly as the agents for the district (See *Tregea* case supra), deliberately undertook to appropriate the properties of the petitioners and their predeces-

sors in title and bestow the same upon the bondholders of the district now chiefly consisting of Mr. J. W. Harrell the dominating and controlling bondholder of the district who also happens to be associate counsel for the respondents before this court. In the case of *Wilkinson* v. *Leland*, 2 Peters 627, 646; 7 Law Ed. 542, 549 Mr. Webster said:

> "It is as if A, a creditor of B, should go to the Legislature and ask that B's property be transferred to him without a trial. It is a condemnation without a hearing, a confiscation of property in time of peace."

In 2 Peters, text 658 and in 7 Law Ed. text 553, Mr. Justice Story delivering the opinion of the court agreed with Mr. Webster by saying:

> "We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

If it is thus incompetent for a Legislature to confiscate or transfer property from A to B, then much more so was it incompetent for the supervisors of this Drainage District to accomplish the same result. The fundamental rights of the petitioners and their predecessors in title, protected by the 14th Amendment, have been and continue to be violated. Yet the Supreme Court of Florida undertakes to approve the same on the formula that notwithstanding the averments of the bill, some former owner "could have protested."

Question 4 stated page 17 of our petition and reason D stated page 33 of our petition and assignment of error 4, stated page 39 of our supporting brief, point out further that the proceedings of the supervisors as complained of

in Section VIII, XII and XIII of the bill operated to deprive then existing landowners and petitioners of any hearing whatsoever as required by what is now sections 1491 and 1500, Compiled General Laws of Florida, all with the result that petitioners and their predecessors in title have never had any day in court with respect to the original assessments of benefits which the supervisors continued to use as a basis for tax levies after they had illegally attempted to change the original decree and the plans of reclamation. In short the attempted proceedings of the commissioners as complained of in Sections VIII and XII of the bill were without jurisdiction under the drainage law and wholly void as well as depriving petitioners and their predecessors in title of all hearing and all opportunity to be heard. The doctrine of *Browning* v. *Hooper* quoted page 23 of our petition was clearly violated. The Supreme Court of Florida gave no heed to that proposition though strenuously urged in the bill itself and by the numerous arguments submitted to that court. The court attempted to shut the door on the ground of acquiescence even though it was alleged by the petitioners and admitted by the attacking motions that the supervisors acting as agents for the district concealed their acts and doings.

Question 5, stated page 24 of our petition, and Reason E, stated page 34 of our petition, and assignment of error 5, page 39 of our supporting brief, point out additional reasons why petitioners and their predecessors in title were and are being deprived of their properties without due process of law, contrary to the 14th amendment.

The only suggested answer to questions 4 and 5, found in the brief for respondents, is alleged acquiescence and laches. We have already pointed out that no basis for acquiescence exists under the admitted allegations of the amended bill, neither does any basis exist for laches when we consider the parties, namely the respondents, who now

are undertaking to urge such matters. The district and its supervisors were the parties who falsified their records to prevent landowners, including the petitioners, from learning the true facts upon which they might have predicated a proper defense, or attack.

In *4 Pomeroy's Eq. Jur.*, 4th Ed., Sec. 1447, it is said:

> "A person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights."

Again in the same volume, Sec. 1456, it is said:

> "It had been held that where the party interposing the defense of laches has contributed to, or caused the delay, he cannot take advantage of it."

The admitted averments of Sec. XII of the bill and related sections convict the supervisors of the district of illegal conduct and of secreting their conduct. The fact is, it required several months diligent search by the writer of this brief to uncover sufficient facts to institute this suit. Again it is axiomatic that no one can complain of laches any more than he can of acquiescence unless he has been injured thereby. Section XVI of the bill in this case specifically alleges no injury and no change of position. *Ketchum* v. *Duncan*, 96 U. S. 659, 666.

Question 6, stated page 27 of our petition, and Reason F, stated page 34 of our petition, and assignment of error 6, page 40 of our supporting brief, likewise remain unanswered by opposing counsel. The majority opinion of the Supreme Court of Florida was also entirely silent on the subject of whether or not maintenance taxes, past or future, could be justly enforced. Counsel for respondents undertake to sidestep this question as they have others by claiming that it was not properly presented so as to be competent for this Court's consideration. They say it wasn't

sufficiently raised in the bill and that it was too late to raise it by petition for rehearing. We think they are in error on both parts of their contention. In the first place, Sec. XV of the bill beginning R-69 in effect repleaded what had been said in prior sections attacking the levy of installment taxes for debt service purposes. The court will see, R-72 and R-73, that the averments of Sections VI, VIII and XIV dealing with attacks upon installment taxes, were in effect repleaded as attacks upon maintenance taxes and those sections specifically charged violation of the due process and equal protection clauses of the 14th amendment. In addition, Sec. XV of the bill concluded, R-74, with the averment that all maintenance taxes levied:

> "for said involvent and defunct district, were wholly arbitrary and amounted to a spoliation of plaintiff's properties."

Thus opposing counsel and the court below were clearly given to understand that reliance was placed upon the protection of the due process and equal protection clauses of the 14th amendment.

No particular form of words or phrases is essential to draw in question the validity of a State statute or the validity of some application of a State statute. *Greenbay & Mississippi Can Co.* v. *Patton Paper Co.*, 172 U. S. 58, 43 Law Ed. 364 (2d headnote, Law Ed.); *New York* v. *Zimmerman*, 278 U. S. 63, 73 Law Ed. 184 (1st headnote).

In addition to the attacks so made by Sec. XV of the bill itself, grounds 8, 9, 10 and 11 of the petition for rehearing, R-135, again specifically raised the question of the invalidity of maintenance taxes because inconsistent with due process and equal protection of the laws, secured by the 14th Amendment. Counsel urge that such a point was too late when raised by petition for rehearing. That

would be true if the Supreme Court of Florida had merely denied the petition and nothing more, but that did not happen. On the contrary the Supreme Court of Florida granted the petition in part on May 17, 1944, and set the same down for oral argument as to the part granted, see page 29 of our petition. Having considered the petition and having granted it in part, the order so granting it in part, in effect, denied grounds 8, 9, 10 and 11 thereof, which grounds specifically called the court's attention to the invalidity of maintenance taxes for constitutional reasons. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 367, 77 Law Ed. 360, 368 (7th headnote, Law Ed.).

It is true as stated bottom page 13 of respondents' brief that the Supreme Court of Florida finally held that the three-year General Statute of Limitations does not apply to drainage taxes. On May 9, 1944, the court rendered an opinion without dissent holding that the three-year Statute of Limitations did apply to drainage taxes, but on rehearing, they rendered another opinion without any dissent holding just the opposite. The two opinions are now reported 19 So. 2d, page 234. We submit, however, that the complete somersault of the Supreme Court of Florida on that question cannot aid the respondents in answering any of the questions now presented by our petition for certiorari. The simple reason is that we have not sought any review by this Court of the Supreme Court of Florida's last conclusion on that question of State law. If it be conceded that the Supreme Court's last opinion in the *Ideal Farms* case is correct, that is certainly no answer to the constitutional attacks we make on maintenance taxes as concisely stated page 27 of our petition.

Additional Reason for Writ of Certiorari:

J. THE UNITED STATES IS NOW A LARGE LAND OWNER IN THE BALDWIN DRAINAGE DISTRICT AND IF THE DECISION OF THE SUPREME COURT OF FLORIDA STANDS THE UNITED STATES CAN NEITHER SELL NOR DONATE ITS LAND TO ANY PRIVATE OWNER WHEN THE WAR ENDS.

The "Surplus Property Act of 1944" contemplated that landing fields and gunnery ranges such as acquired in the Baldwin Drainage district, 12 to 20 miles west of the City of Jacksonville shall be disposed of by sale or otherwise, to former owners or to veterans. 50 U. S. C. A. Sec. 1632(d) and (f).

Mention is made page 14 of respondents' brief of the case of *Bostwick* v. *Baldwin Drainage District* in which certiorari was denied, 319 U. S. 742. The record in that case may be judicially noticed in connection with the Surplus Property Act. By reference to the transcript in that case, it will be seen that the *Bostwick* case involved adverse claims to what was known as Duval Cattle Company lands foreclosed in the case of *Duval Cattle Company* v. *Hemphill* receiver 41 Fed. 2d 433. The attack on jurisdictional grounds made by Mrs. Bostwick as to said "decree lands" failed, because the doctrine of *res adjudicata* was too well entrenched to permit any break-through. There was involved in the same case however, many "non-decree lands" such as parcel 23, pages 35 and 26 of that record formerly owned by Mrs. Bostwick. The jury, page 273 of that record awarded $5.00 per acre for parcel 23 and many other parcels involved in that area of 2666 acres. A map page 231 of that transcript shows the location of all the lands in the Cecil Field tract including the "non-decree lands" of Mrs. Bostwick. The last line of page 71 of that transcript relates to 40 acres of Mrs. Bostwick's $5.00 lands and it there appears that the drainage taxes claimed

against that 40 acres for the years 1919 and 1941 inclusive amounted to $1106.35 or more than $27.00 per acre, or more than $1.00 per acre per year. Section VII, VIII, IX and X of the answer in that case, transcript 118 to 141 showed that the Bostwick lands lying along Sal Taylor Creek were never benefited one iota but were annually flooded by excess waters discharged into the upper course of that creek. That no drainage improvement whatsoever was ever created anywhere in the vicinity of those lands. Much the same showing was made as to those lands as with respect to the lands of the petitioners in the case at bar. The issues so tendered with respect to said "non-decree lands" were not decided in said *Federal* case, but were left undisposed of awaiting the decision of the Supreme Court of Florida in this case, see the Bostwick transcript page 275.

If the War ends in the near future and the decision of the Supreme Court of Florida stands unchanged, then Mrs. Bostwick or any other former owner would be foolish to buy their lands back from the United States at $5.00 per acre or any other price for the simple reason that the drainage district would again begin levying installment taxes and maintenance taxes against such lands in amounts that would in four or five years again completely eat up the value thereof. The same result would follow if the United States donated such lands back to Mrs. Bostwick and other former owners. Veterans of the present War would be in no better situation if the United States wanted to sell or donate such lands to them pursuant to the Surplus Property Act.

The situation as above explained with regard to the lands in the Cecil Field area of 2666 acres, applies equally to the "Yellow Water Gunnery Range" of some 9000 acres which the United States also took and now owns between Cecil

Field and the Seaboard Railroad as may be seen on the map page 231 of the Bostwick transcript and the same situation applies to some four or five other landing fields taken in the Baldwin Drainage District area. So long as the United States continues to own these lands, the power of the Drainage District to levy any further taxes is held in abeyance. 48 Am. Jur. page 641 Sec. 86. But if the United States offers to sell or offers to donate its lands to private parties, such prospective purchasers or donees will be immediately confronted with an annual drainage tax burden greater than they could carry on lands fit chiefly for cattle ranch purposes and not worth more than $5.00 per acre. The decision of the Florida Supreme Court is to the effect that a tax deed direct from the State leaves the land subject to all *past* and *future* drainage taxes. By the same token these United States lands, if passed to private ownership, will again be subject to these void and confiscatory drainage taxes.

We submit, therefore, that the late Surplus Property Act has made the United States a party directly interested in the outcome of this case. All of the holdings acquired by the United States in the Baldwin Drainage District, as the situation now stands under the decision of the Supreme Court of Florida, are worthless as regards any disposition to private ownership.

Conclusion

Petitioners have made a long and determined fight for their rights in this case.

In the case at bar, the petitioners after securing the consent of the Attorney General, attacked the existence of the district by *quo warranto* see *State* v. *Covington*, 148 Fla. 42, decided August 1941, where the petitioners or some of them failed because the court held that the district had "at least a defacto existence." This chancery suit was soon after-

wards filed. In the meantime various condemnation suits were filed as to lands in the Baldwin Drainage District owned by various clients of the writer. Answers were filed in those suits, setting up attacks upon the drainage taxes similar to those made in this chancery suit and the Federal Court has not yet made any disposition of funds awarded by the juries in those cases but is awaiting the outcome of this petition for certiorari.

During the 10-year period of the Federal receivership from 1924 to 1934 the records of the Drainage District were tightly kept in the hands of the receiver and his attorney. When the Federal Court discharged the receiver and dismissed all undisposed of tax foreclosure suits (R. 68) the affairs of the insolvent district went into a state of coma and remained so until this suit was filed seeking to clear petitioners titles of arbitrary, void and unconstitutional drainage taxes.

Ever since the signing of the Magna Charta we have supposed that for every wrong there is a remedy and that justice will neither be delayed nor denied.

We respectfully submit that a writ of certiorari should be granted.

Respectfully submitted,

THOS. B. ADAMS,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES.

MACCLENNY TURPENTINE COMPANY, A Florida Corporation, et al., Petitioners, vs. BALDWIN DRAINAGE DISTRICT, A Public Corporation, et al. Respondents.	)	CASE V14

MEMO FOR PETITIONERS

Since the preparation of reply brief in this case, we have noted the decision of the Supreme Court of Florida in Richmond vs. Town of Lenan now reported 19 So. 2d, 791 as decided by the Supreme Court of Florida, Nov. 24, 1944. The points decided by the Supreme Court of Florida in the Richmond case are in many particulars wholly inconsistent with the conclusion reached by the Supreme Court of Florida in this Baldwin Drainage District case. In short the Supreme Court of Florida in the Richmond case recognized and upholds the fundamental rights of property owners occupying situations similar to those of petitioners in this case. Briefly the court holds that:

> There can be no tax burdens even for general municipal purposes where there was no benefit and no prospect of any benefit to lands now excluded from the municipality because they never should have been included.

See also the 5th and 8th headnotes. These conclusions were reached in the face of arguments of laches and acquiescence vigorously urged by the same counsel who now represents the respondents in this cause.

Thos. B. Adams,
Attorney for Petitioners.